Jurisdictional Statement

Supreme Court, U.S.
FILED
APR 1 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1814

IN THE

Supreme Court of the United States

October Term, 1981

LAKE CARRIERS ASSOCIATION, et al.
and
DOMINION MARINE ASSOCIATION,
Appellants,
v.
FRANK J. KELLEY, MICHIGAN ATTORNEY GENERAL, et al.
Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether sections 312(f)(3) and (4)(A) of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 *et seq.*, 33 U.S.C. 1322(f)(3) and 4 (A) constitute an unconstitutional delegation of Congress' authority under the commerce clause, U.S. Const. art. I, § 8, cl. 3, and the grant of admiralty jurisdiction to the federal government, U.S. Const. art III, § 2 in that it permits states to completely prohibit discharge of any effluent from commercial vessels equipped with federally certified marine sanitation devices which meet pollution standards promulgated by the Environmental Protection Agency?

2. Whether the Michigan Watercraft Pollution Control Act of 1970, 1970 P.A. 167, MCLA 323.331 *et seq.*, MSA 3.533(201) *et seq.* materially affects interstate and foreign commerce in matters where uniformity is necessary and relate to a subject demanding exclusive Federal regulation?

3. Whether the Michigan Watercraft Pollution Control Act of 1970, *supra*, contravenes the essential purposes of and works material injury to characteristic features of the maritime law and interferes with its proper harmony and uniformity?

4. Whether the Michigan Watercraft Pollution Control Act of 1970, *supra*, constitutes a taking of appellants' property without due process of law in violation of U.S. Const. amend. XIV, § 1.

5. Whether the Michigan Watercraft Pollution Control Act of 1970, *supra*, denies to appellants the equal protection of the laws in violation of U.S. Const. amend. XIV, § 1 in that such act makes it unlawful for commercial vessels to discharge overboard any sewage,

whether treated or not, while at the same time no Michigan law prohibits shore based industry and municipalities from discharging inadequately treated sewage into the waters of the Great Lakes?

6. Whether the 1976 Determination of the Administrator of the Environmental Protection Agency, 41 Fed. Reg. No. 10, p. 2274, Thurs, Jan. 15, 1976, under section 312(f)(3) of the Federal Water Pollution Control Act Amendments of 1972, *supra*, is invalid because neither the determination by nor the application of the State of Michigan were taken and made after the effective date of the federal regulations?

7. Whether the Determination of the Administrator of the Environmental Protection Agency, *supra*, made in 1976, is now invalid since section 59(a) of the Federal Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 *et seq.*, 33 U.S.C. 1322(a)(6), requires inclusion of "gray water" as sewage, in the Great Lakes thus dramatically increasing the volumes that have to be contained on board ship?

8. Whether the strict containment of vessel wastes required by the Michigan Water Pollution Control Act of 1970, *supra*, violates and conflicts with the Boundary Waters Treaty of 1909, 36 Stat. 2448, and the Great Lakes Water Quality Agreement of April 15, 1972, 23 U.S.T. 301?

PARTIES

Appellants, plaintiffs below, are Lake Carriers' Association, and its individual members, American Steamship Company, Inc.; USS Great Lakes Fleet, Inc.; Great Lakes Steamship Division, Bethlehem Steel Corporation; Cleveland-Cliffs Steamship Company; Cleveland Tankers, Inc.; Erie Sand Steamship Company; The Hanna Mining Company; Cement Division,

National Gypsum Company; Inland Steel Company; Interlake Steamship Company, Division of Pickands Mather & Company; Cement Transit Company, Division of Medusa Corporation; Columbia Transportation Division of Oglebay Norton Company.

Appellant, Dominion Marine Association, intervening plaintiff below. The corporate members of Dominion Marine Association, not parties, but affiliates under Rule 28.1, are Algoma Central Railway; Algoma Steel Corp. Limited; Branch Lines, Ltd.; Canada Steamship Lines, Inc.; Carryore Limited; Chimo Shipping Limited; Dale Transports Limited; Federal Commerce & Navigation Ltd.; Gulf Canada Limited; Halco, Inc.; Imperial Oil Limited; Misener Transportation Ltd.; Mohawk Navigation Co. Ltd.; N.M. Paterson & Sons Limited; Ontario Lake Erie Sand Ltd.; Quebec & Ontario Transportation Co. Ltd.; Shell Canadian Tankers Ltd.; Texaco Canada Inc.; the Soo River Company; Upper Lakes Shipping Limited.

Appellees, defendants below, are the Michigan Department of Natural Resources, its Director, and its or his successor or successors charged with enforcement of the Michigan Watercraft Pollution Control Act, and Frank J. Kelley, Attorney General for the State of Michigan, and his successors in such office.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is reported below at 527 F. Supp. 1114 (E.D., Mich. 1981) and is included in the appendix. The decision of the Michigan Supreme Court is reported at 407 Mich. 424, 286 N.W. 2d 416 (1979). The decision of the Michigan Court of Appeals is reported at 91 Mich. App. 357, 282 N.W.2d 486 (1979). The decision of the Michigan Circuit Court is not reported and therefore is included in the Appendix, page 64.

Appellants originally filed suit for Declaratory Judgment and Injunctive Relief in Federal Court, *Lake Carriers' Association v. MacMullan*, 336 F.Supp. 248 (E.D. Mich. 1971). On appeal this court held abstention proper and remanded ordering that jurisdiction be retained while proper state proceedings were pursued, *Lake Carriers' Association v MacMullan*, 406 U.S. 498 (1972).

JURISDICTION

The jurisdiction of the United States Supreme Court to review the decision of this three-judge District Court is provided by 28 U.S.C. Sec. 1253, *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

The original action here involved was instituted by appellants on March 16, 1971 before a three-judge district court convened under 28 U.S.C. Sec. 2281 (1970) (repealed 1976) to challenge the constitutionality under federal law of the Michigan Watercraft Pollution Control Act of 1970, 1970 P.A. 167, MCLA 323.331 *et seq.*, MSA 3.533(201) *et seq.*

The Judgment appealed from was entered December 15, 1981. Notice of Appeal was filed in the United States District Court for the Eastern District of Michigan, Southern Division on February 2, 1982, and is included in the appendix.

It should be noted that 28 U.S.C. § 2403(a) may be applicable in this matter as the constitutionality of an act of Congress is in question. To date, the United States District Court For the Eastern District of Michigan, Southern Division, has not certified to the United States Attorney General the fact that the constitutionality of an Act of Congress has been drawn into question.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES

United States Constitution

U.S. Const. art. I, § 8, cl. 3.

The Congress shall have power — To regulate Commerce with foreign nations, and among the several States, —

U.S. Const. art. III, § 2.

The judicial Power shall extend — to all Cases of admiralty and maritime Jurisdiction;

U.S. Const. art. VI, cl. 2.

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, — shall be the Supreme Law of the Land.

U.S. Const. Amend. XIV, § 1.

— No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Treaties and International Agreements

Article I, Boundary Waters Treaty of 1909; 36 Stat. 2448, Treaty Series No. 548:

"— the navigation of all navigable boundary waters shall forever continue free and open for

the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

36 Stat. 2448 at 2449

Annex 4, Great Lakes Water Quality Agreement, with annexes and texts and terms of reference, April 15, 1972; Treaties and Other International Acts, Series No. 7312, 23 U.S.T. 301:

"2. *Compatible Regulations.* The Parties shall adopt — regulations governing the disposal of vessel waste — in accordance with principles at least as stringent as the following:

(a) Garbage shall not be discharged by a vessel into these waters

(b) Waste water shall not be discharged by a vessel into these waters in amounts or in concentrations that will be deleterious;

(c) Every vessel operating in these waters with an installed toilet facility shall be equipped with a device or devices to contain the vessel's sewage, or to incinerate it, *or to treat it to an adequate degree.*" Emphasis supplied.

23 U.S.T. 301 at 334 (Annex 4)

Statutes

The Federal Water Pollution Control Act, Amendments of 1972, as amended by the *Clean Water Act of 1977*, 33 U.S.C. § 1322:

"(a)(6) 'sewage' means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes except that, with respect to commercial vessels on the Great Lakes, such term shall include graywater;"

"(c)(1)(A) Initial standards and regulations under this section shall become effective for new vessels two years after promulgation; and for existing vessels five years after promulgation. Revisions of standards and regulations shall be effective upon promulgation, unless another effective date is specified, except that no revision shall take effect before the effective date of the standard or regulation being revised."

"(c)(1)(B) The Administrator shall, with respect to commercial vessels on the Great Lakes, establish standards which require at a minimum the equivalent of secondary treatment as defined under section 1314(d) of this title. Such standards and regulations shall take effect for existing vessels after such time as the Administrator determines to be reasonable for the upgrading of marine sanitation devices to attain such standards."

"(f)(1) After the effective date of the initial standards and regulations promulgated under this section, no State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section."

"(f)(3) After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination with 90 days of the date of such application."

"(f)(4)(A) If the Administrator determines upon application by a State that the protection and enhancement of the quality of specified waters within such State requires such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into such waters."

The Michigan Watercraft Pollution Control Act of 1970, 1970 P.A. 167, MCLA 323.331 *et seq.*, MSA 3.533(201) *et seq.*

"MSA 3.533(202)(g) 'Watercraft' means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft."

"(203)(1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

"(204)(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dock-side or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution. . ."

"(211) Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.'

STATEMENT OF THE CASE

This is the second time substantially the same issues are to be presented to this Court.

In its original decision in *Lake Carriers' Association*, v. *MacMullan*, 406 U.S. 498 (1972), this Court indicated that it was satisfied that authoritative resolution of the ambiguities in the Michigan law were sufficiently likely to avoid or significantly modify the federal claims raised by plaintiffs so as to warrant abstention, particularly in view of the absence of countervailing considerations that the Court had found compelling in prior decisions. Unfortunately, such has not proven to be the case.

After eight years of litigation in the Michigan courts, the Michigan Supreme Court held that the Michigan Watercraft Pollution Control Act of 1970, 1970 P.A. 167, MCLA 323.331, *et seq.*; MSA 3.533(201), *et seq.*,

absolutely prohibits the discharge of sewage, whether treated or untreated, from watercraft in Michigan waters. *Lake Carriers' Association* v. *Director of the Department of Natural Resources*, 407 Mich 424 (1979). Thus the federal questions originally raised before this Court have not been avoided or even significantly modified.

The facts with respect to the nature of Great Lakes trade and commerce have not materially changed. Nevertheless certain developments since 1971 should be noted: In that year 187 federally licensed Great Lakes bulk cargo vessels were enrolled in Lake Carriers' Association. Due to attrition and obsolescence the present enrollment in the Association is now 128 vessels. So, too, the number of members in the Association has been materially reduced due to many companies ceasing to do business. The Canadian fleet represented by Dominion Marine Association totals another 175 vessels.

The federal rules and regulations governing certification procedures, and design and construction requirements for marine sanitation devices, 33 C.F.R., Part. 159, (1981), promulgated under authority of the Federal Water Pollution Control Act Amendments of 1972, as amended Pub. L. 92-500, 86 Stat. 816, *et seq.*, 33 U.S.C. 1322, came into effect on January 30, 1980. As a result, all U.S. Great Lakes commercial vessels engaged in interstate and foreign commerce are equipped with federally certified marine sanitation devices. Were they not so equipped, the U.S. Coast Guard would not issue a certificate of inspection which is the license that entitles them to sail.

The Canadian fleet is similarly equipped under regulations issued by its federal authority and now fully effective. *Canada Gazette Part II, Vol. 111, No. 4, p. 485, et seq.*

The Clean Water Act Amendments of 1977, Pub. L. 95-217, 91 Stat 1566, 33 U.S.C. 1322(a)(6) modified the Federal Water Pollution Control Act in certain significant respects as they pertain to Great Lakes vessels. That Act modified Section 312 of the Federal Water Pollution Control Act Amendments of 1972, *supra*, by redefining the definition of sewage with respect to commercial vessels on the Great Lakes so as to include gray water. Gray water means galley, bath and shower water. Such Section was further amended by providing that:

> "The Administrator shall, with respect to commercial vessels on the Great Lakes, establish standards which require at a minimum the equivalent of secondary treatment as defined under Section 304(d) of this Act. Such standards and regulations shall take effect for existing vessels after such time as the Administrator determines to be reasonable for the upgrading of marine sanitation devices to attain such standard."

Thus Great Lakes vessels are obligated by federal law to meet federal standards equal to those imposed on shoreside municipalities and industries discharging treated wastes into the waters of the Great Lakes.

Section 312(f)(1) of the Federal Water Pollution Control Act Amendments 1972, *supra*, further provides:

> "After the effective date of the initial standards and regulations promulgated under this Section, no State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this Section."

Since the federal standards came into force on January 30, 1980, it is evident that State power is pre-empted and that no State can enforce any statute with respect to the design, manufacture or installation or use of any marine sanitation device on any vessel subject to federal standards.

The Great Lakes Water Quality Agreement between the U.S. and Canada signed at Ottawa April 15, 1972; Treaties and Other International Acts, Series 7312, 23 U.S.T. 301, Annex 4, provides:

> "Every vessel operating in these waters with an installed toilet facility shall be equipped with a device or devices to contain the vessel's sewage or to incinerate it, *or to treat it to an adequate degree*." (Emphasis supplied)

Thus both the Federal Water Pollution Control Act Amendments of 1972, *supra*, as amended, and the Great Lakes Water Quality Agreement of 1972, *supra*, envision pollution control through onboard sewage treatment before disposal in navigable waters. Michigan, on the other hand, relying upon an interpretation of its Water Pollution Control Act of 1970, *supra*, by the Michigan Supreme Court, contends that it is entitled to prohibit the discharge in its waters of sewage, treated to federal standards, from commercial vessels engaged in interstate and foreign commerce. Consequently two conflicting theories emerge as to the approach to the problems of pollution control. The courts have long recognized that conflicts between federal and state law are to be resolved as a matter of supremacy, not policy. The cardinal rule is that federal regulation should be deemed pre-emptive of state regulatory power if either the nature of the regulated subject permits no other conclusion or that the Congress has unmistakenly so ordained. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132.

Michigan relies upon the determination of January 9, 1976 by the Administrator of the EPA that adequate facilities for the safe and sanitary removal and treatment of sewage from vessels are reasonably available with respect to Michigan waters, 41 Fed. Reg. No. 10, p. 2274, Thurs., January 15, 1976. That determination was purportedly made pursuant to Section 312(f)(3) of the Federal Water Pollution Control Act Amendments of 1972, as amended, 33 USC 1322(f)(3). Such Section provides:

> "After the effective date of the initial standards and regulations promulgated under this Section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application."

Despite the tortuous course charted by the District Court through a maze of varying effective dates in an effort to validate the EPA determination, the "wait and see if you need more protection" condition of the statute is effectively ignored; and whatever may be said of the timeliness of Michigan's application, *the 1970 Michigan legislation clearly cannot be termed a "determination" after*

One located at the Ford Motor Company, Dearborn, Michigan; the other at the Huron Cement Company, Alpena, Michigan, both private docks serving their own private fleets. The State of Michigan has not constructed any pumpout facilities for commercial vessels and offers no solution for vessels merely passing through Michigan waters and not docking at any Michigan port.

The District Court initially found that "crew sizes range from 30 to 35 men per vessel, and it is estimated that each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water)."

Since under federal law Great Lakes commercial vessels are required to treat gray water as well as sanitary wastes, application of the Michigan law would mean that this by-product, although treated to secondary standards, would have to be stored in holding tanks for ultimate pumpout ashore. Assuming a 32-man crew generating 125 gallons of liquid wastes per man a day, and a retention capacity for 12 days, the holding tank capacity required would be 48,000 gallons ultimately to be disposed of in municipal facilities of the State of Michigan, many of which do not have as yet secondary treatment.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court below acknowledged that this case presents important, strongly disputed and difficult questions.

One could hardly over emphasize the national and international importance of the Great Lakes. If the commercial vessel operators of both the United States

any possible effective date. Michigan points to no other act to supply this deficiency, which cannot be remedied by the action of its Governor "applying" as distinguished from "determining." He could apply — only the Legislature could determine.

Further, there is no evidence that Michigan's waters would receive greater protection by requiring commercial vessels to pump ashore. The standards for municipalities on the Michigan shores of the Great Lakes are identical to the federal standards for vessels; namely, secondary treatment.

There is evidence in the record that Detroit is achieving secondary treatment for only about one-half of its flow-through now.

There is also uncontraverted evidence that Michigan has never attempted to evaluate the effects of discharges from commercial vessels on the Great Lakes. Its only study was made prior to the passage of the Michigan statute and related to recreational watercraft. There has never been a further study, and there is no evidence in the record that discharges from commercial vessels have endangered or even affected the water quality of Michigan waters or of the Great Lakes to justify a no-discharge rule, or to meet the "determination" standards of the federal act, 33 USC 1322(*f*)(3), that the "protection and enhancement of the quality of some or all of the waters (within such State) require greater environmental protection."

Since 1977 the State has made no further inquiries as to the availability of pumpout facilities for commercial vessels at any lake ports. Only two pumpout facilities for commercial vessels have been identified by the State:

and Canada are now to be burdened by varying regulation by the several States after more than a decade of attempting to meet the federal standards fixed by national and international action and agreement, certainly this Court should be the body to say so, and, we respectfully submit, only after a full review of the record and on briefs and oral argument.

The power of Congress to exercise exclusive control over the operations in interstate and foreign commerce specifically involved here cannot be delegated to the states. Federal superintendence of the field is essential. Were not such the case the diverse state laws occasioning contradictory or overlapping regulations, vis-a-vis federal regulations in the same field, would frustrate the constitutional purpose of achieving uniformity.

The intent and purpose of Congress was to permit vessel operators to design and develop necessary pollution control devices and install them on their vesseis prior to the effective date of the federal standards. The Congress never intended that the states should come forward with a proliferation of varying and different requirements which in effect hamper and impede vessel operations throughout the entire Great Lakes/St. Lawrence Seaway system. The adequacy or inadequacy of the federal law is not an issue here. The very nature of the subject matter, namely, marine sanitation devices on board federally licensed vessels, requires uniform federal regulation and the Congress cannot yield its responsibility in this matter to the states.

We are here dealing with a specific equipment on vessels which must serve the commercial needs of some eight separate states and two provinces of Canada. The

impermissible burden on interstate and foreign commerce is so apparent as to preclude the Congress from delegating its regulatory authority to the states.

Apart from U.S. Const. art I, § 8, cl. 3 relating to interstate and foreign commerce, the Constitution denies to the states all power by legislation to contravene the essential purposes of or to work material injury to the characteristic features of the maritime law or to interfere with its proper harmony and uniformity.

U.S. Const. art III, § 2 extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction"; and U.S. Const. art. I, § 8 confers upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any department or offices thereof." It is settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler* v. *Boston & Savannah Steamship Co*, 130 U.S. 527, (1889).

Indeed, the Constitution itself has occupied the field by taking from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of maritime law or to interfere with its proper harmony and uniformity. *The Lottawanna*, 21 Wall. 558, (1874); *Workman* v. *New York City*, 179 U.S. 552, (1900); *The Moses Taylor*, 4 Wall. 411, (1866); *Steamboat Co.* v. *Chase*, 16 Wall. 522, (1872); *The Roanoke*, 189 U.S. 185, (1903).

In *The Lottawanna, supra*, it was said, page 575:

> "One thing, however, is unquestionable, the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under this disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

In *Southern Pacific Co* v. *Jensen*, 244 U.S. 205, (1916), this Court held that New York could not apply its Workmen's Compensation Act to stevedores injured in New York while unloading a vessel engaged in coastwise traffic.

Following the *Jensen* decision, Congress enacted a statute to permit the several states to apply their compensation laws to maritime injuries. In *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920), the statute was held to be beyond the power of Congress. Said this Court, page 164:

> "The definite object of the grant (of power of Congress to legislate on rights and liabilities within maritime jurisdiction) was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

Concerning due process and equal protection of the laws, there are substantial questions raised on the record, including but not limited to, whether the Michigan Act is arbitrary, unreasonable and capricious in that the means selected, i.e., holding tanks or incinerating devices, bears no real and substantial relationship to the objective to be achieved, i.e., the protection of the public health and welfare of the citizens of Michigan.

The 14th Amendment of the Constitution as respects state action concerning interstate and foreign commerce conditions the exercise of that action by requiring that the end shall be accomplished by methods consistent with due process and, as often has been held, the guarantee of due process demands that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained. *Nebbia* v. *New York*, 291 U.S. 502, 524 (1934).

In inquiring into the reasonableness of an Act, the Court must evaluate the relative weights of the beneficial consequences which would follow from upholding the statute and the price which must be paid for them in the form of the resulting deprivation of rights or property. *See The Consideration of Facts in Due Process Cases*, 30 Columbia Law Review 360, 362 (1930).

Accordingly, the beneficial consequences that would follow from upholding the Michigan statute are nil and yet the price that the Appellants must pay is severe. Alternate methods are available for obtaining the desired

end; namely, the installation of shipboard waste treatment systems equal to secondary waste treatment now permitted under the federal standards.

The international questions present a rare occasion for disagreement in the otherwise cooperative relationship between the United States and Canada in the use and care of the waters of the Great Lakes.

As early as 1909 that mutual concern and cooperative spirit was evidenced and carried forward by the *Boundary Waters Treaty of 1909*, 36 Stat. 2448, Treaty Series No. 548.

That Treaty, if it did nothing else, recognized the necessity for joint exercise of national power to protect and preserve the availability of these great international waterways to both countries.

When pollution became a recognized problem, it was specifically dealt with in the *Great Lakes Water Quality Agreement of 1972*, 23 U.S.T. 301, calling for "compatible" federal regulations by both the United States and Canada governing the disposal of vessel waste.

That Congress would or intended to permit a State to overturn such commendable international aims and achievements without the slightest showing of necessity seems unthinkable. Yet, this is precisely the effect of the District Court's decision on a record totally devoid of evidence that Michigan's waters "require greater environmental protection"; a record in fact from which it clearly appears that Michigan not only cannot demonstrate a need to contain commercial vessel wastes, but that it has made no effort to determine what the effect of such wastes, treated or otherwise, might be.

Appellants therefore urge that substantial federal and international questions of great public importance and concern are involved in this litigation which deserve and should be afforded the full attention of this Court.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION AND ORDER

(United States District Court
Eastern District of Michigan Southern Division)

(Lake Carriers' Association, et al, Plaintiffs, v. Frank J. Kelley, Michigan Attorney General, et al, Defendants. Civil Action No. 36194)

Before Edwards, Chief Circuit Judge, Keith, Circuit Judge and Pratt,[1] District Judge.

Edwards, Chief Circuit Judge. After years of preliminary litigation,[2] the complaints of shipowners on the Great Lakes against the efforts of the State of Michigan to prohibit their ships' pollution of its waters by emission of sewage, either raw or treated, is back before this Court. Michigan clearly has, by action of its Legislature and Governor, and more recently, by interpretation of the applicable statute by the Michigan Supreme Court, undertaken to make it unlawful for any

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[1] This panel is a three-judge district court convened under 28 U.S.C. § 2281 (1970) (repealed 1976) to hear plaintiffs' challenge to the constitutionality under federal law of the Michigan Watercraft Pollution Control Act of 1970, Mich. Comp. Laws Ann. § 323.331 *et seq.* (1975), Mich. Stat. Ann. § 3.533(201) *et seq.* (1978)).

[2] Plaintiffs originally filed suit for a declaratory judgment in federal court. *Lake Carriers' Assoc.* v. *MacMullan*, 336 F.Supp. 248 (E.D. Mich. 1971). On appeal, the Supreme Court held abstention proper and remanded, ordering that jurisdiction be retained while state proceedings were pursued. *Lake Carriers' Assoc.* v. *MacMullan*, 406 U.S. 498 (1972). Both the circuit court and the Michigan Court of Appeals held that the statute prohibited only the emission of inadequately treated sewage. *Lake Carriers* v. *MacMullan*, 91 Mich. App. 357, 282 N.W.2d 486 (1979). The Michigan Supreme Court held that the Act prohibited all sewage, thus leaving federal issues unresolved. *Lake Carriers* v. *Director, DNR*, 407 Mich. 424, 286 N.W.2d 416 (1979).

shipping to discharge either untreated sewage within its state boundaries. Michigan's boundaries encompass Great Lakes shipping lanes and through Lakes Superior, Michigan, Huron and Erie and through the lakes and rivers interconnecting them — thus potentially applying Michigan's pollution standard to most shipping on the Great Lakes whether interstate or international.

This case presents several important, strongly disputed and difficult questions. First, plaintiffs contend that Michigan acted prematurely in its efforts to take advantage of Congress' delegation of authority to the states to "completely prohibit the discharge from all vessels of any sewage, whether treated or not."

Second, plaintiffs argue that the federal statute authorizing states to prohibit all sewage discharges[3] is unconstitutional because it violates the purpose of uniformity which is implicit in the U.S. Constitution's grant of admiralty jurisdiction to the federal courts.[4]

Third, plaintiffs argue that the statutory delegation of authority just referred to also violates the federal constitution's reservation to the federal government of treaty-making powers in relation to foreign nations — here particularly Canada.

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[3] The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 871 (October 18, 1972), codified at 33 U.S.C. § 1251 *et seq.* (1976).

[4] Art. III § 2 Clause 1 of the United States Constitution provides in part: "The judicial power shall extend to . . . all Cases of admiralty and maritime jurisdiction."

Recognizing as we do that each of plaintiffs' arguments is substantial, we hold (1) that Michigan's actions on this whole record should not be dismissed as premature, (2) that the congressional delegation of authority to the states represents a uniform policy decision by the U.S. Congress which does not offend the Admiralty clause, and (3) that the State and Federal Acts in question do not contravene the treaty-making powers of Congress.

THE PREMATURITY ISSUE

The federal enactments upon which plaintiffs rely are complicated, confusing and arguably contradictory. As a consequence, we search for interpretation which accords with the legislative history, the congressional purposes and the contemporaneous interpretation of the disputed issues by the agencies to which Congress gave responsibility for enforcement or effectuation of the Act.

The Michigan Watercraft Pollution Control Act of 1970, 1970 Mich. Pub. Acts 167 (Mich. Comp. Laws Ann. § 323.331 *et seq.* (1976)) placed in effect a determination by the state that a prohibition against release of any sewage treated or untreated was essential to "the protection and enhancement of the quality of some or all of the waters within such state." This statute by its terms became effective before any of the various dates contained in the federal legislation — and again by its terms — is still in effect. In addition, on two separate occasions Michigan (through its Governor) petitioned the federal Environmental Protection Agency to place in effect regulations banning release of any sewage into Michigan waters. The first such application filed in early

1975 was denied by the Environmental Protection Agency because it did not contain "substantiating information" that Michigan waters required greater protection than was available generally through the federal enactment.

Michigan thereupon furnished by certification information pertaining to pumpout facilities available for use by shipping within Michigan's waters and renewed its request this time under § 1322(f)(3) of the federal Act. On January 9, 1976, the Administrator of the Environmental Protection Agency granted the certification Michigan had requested reciting as follows:

> "On October 9, 1975, notice was published that the State of Michigan had requested a determination by the Administrator, Environmental Protection Agency, pursuant to section 312(f)(3) of Pub. L. 92-500, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Michigan waters of Lakes Michigan, Huron, Superior, Erie and St. Clair, all waterways connected thereto, and all inland lakes.
>
> "The information submitted to me certifies that as of 1972 there were 49 public marinas, 104 commercial marinas available for use to the public, and 19 private marinas not available to the public, all of which have pumpout facilities to serve the recreational boating public. The State estimates that the number of recreational pumpout facilities now exceeds 200. It has been certified by the State that the treatment of wastes from each pump-out facility conforms to State and/or Federal requirements as defined in permit requirements. Moreover it has

been certified by the State that although adequate pump-out stations are not available at all commercial ports, licensed septic tank haulers are reasonably available on call or through contract to pump out commercial vessels at any port in Michigan. For the 20 major ports that service commercial vessels, at least one such hauler is available for each of only three ports, and for each of the remaining ports there are up to eight such haulers available. In populated areas such haulers are available within a 15-mile radius from the port, whereas in upper Michigan's unpopulated areas such haulers are available within a 25-mile radius from the port. As part of the license, such haulers must deposit wastes into State-approved municipal treatment facilities.

"The information submitted to me certifies further that the quality or concentration of chemicals presently used as preservatives or odor suppressants for holding tanks will not prove a deterrent to the operation of the receiving municipal wastewater treatment plant. Such septic tank waste haulers are being and can be used successfully within the State of Michigan to pump out commercially the vessel or from a dockside holding vessel holding tanks either directly from the tank to which sewage is pumped using the ship's pump.

"The Agency received approximately 169 comments in support of the Michigan petition. Approximately 26 comments were received opposing the petition; most of these commented on the general inadequacy of recreational pump-out facilities. Specifically, those opposing the petition variously complained of insufficient suction to pump out all types of

> recreational boats, inadequate operating hours, inconvenient locations, and excessive time requirements for pump out.
>
> "Following an examination of the petition and supporting information, and in consideration of all comments received pursuant to the October 9 FEDERAL REGISTER notice, I have determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Michigan waters of Lakes Michigan, Huron, Superior, Erie and St. Clair, all waterways connected thereto, and all inland lakes. This determination is made pursuant to section 312(f)(3) of Pub. L. 92-500."

41 Fed. Reg. 2274 (Jan. 15, 1976).

A major part of our procedural problem concerns what Congress meant in the following three enactments: (1) Congress adopted a section entitled "Federal Standards of Performance":

> "(b) Federal standards of performance. (1) As soon as possible, after October 18, 1972, and subject to the provisions of § 1254(j) of this title, the Administrator, after consultation with the Secretary of the department in which the Coast Guard is operating, after giving appropriate consideration to the economic costs involved, and within the limits of available technology, shall promulgate Federal standards of performance for marine sanitation devices (hereinafter in this section referred to as 'standards') which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters from new vessels and existing vessels, except vessels not

> equipped with installed toilet facilities. Such standards and standards established under subsection (c)(1)(B) of this section shall be consistent with maritime safety and the marine and navigation laws and regulations and shall be coordinated with the regulations issued under this subsection by the Secretary of the department in which the Coast Guard is operating. The Secretary of the department in which the Coast Guard is operating shall promulgate regulations, which are consistent with standards promulgated under this subsection and subsection (c) of this section and with maritime safety and the marine and navigation laws and regulations governing the design, construction, installation, and operation of any marine sanitation device on board such vessels."

Section 312(b)(1) of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 871 (Oct. 18, 1972), codified at 33 U.S.C. § 1322(b)(1) (1976).

(2) Congress then provided for federal preemption of state laws in § 1322(f)(1) as follows:

> "(f) Regulation by States or political subdivisions thereof; complete prohibition upon discharge of sewage. (1) After the effective date of the initial standards and regulations promulgated under this section, no State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section."

(3) Congress then provided two exceptions to the Preemption provision, the first one of which is contained in § 1322(f)(3):

> "(3) After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application."

and further provided still another provision in 33 U.S.C. § 1322(f)(4) (current version at 33 U.S.C. § 1322(f)(4)(A)):

> "(4)(A) If the Administrator determines upon application by a State that the protection and enhancement of the quality of specified waters within such State requires such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into such waters."

Adding to the complications already referred to is the fact that the statute also set forth three separate effective dates for various categories of vessels. Section 1322(c)(1)(a) provides that the initial standards and

regulations proposed shall become effective "for new vessels two years after promulgation." It also provides that they shall become effective "for existing vessels five years after promulgation." Still a third date is established by § 1322(f)(2) quoted below:

> "(2) If, after promulgation of the initial standards and regulations and prior to their effective date, a vessel is equipped with a marine sanitation device in compliance with such standards and regulations and the installation and operation of such device is in accordance with such standards and regulations, such standards and regulations shall, for the purposes of paragraph (1) of this subsection, become effective with respect to such vessel on the date of such compliance."

Under this last provision, vessels then possessing qualifying marine sanitation devices came into compliance as of the date of promulgation of the regulations. As pointed out below in an opinion issued by the General Counsel of the Environmental Protection Agency on September 25, 1975, this last section "has the practical result of causing early preemption of State laws regulating vessel sewage." The General Counsel's opinion is set forth in full as follows:

> "Interpretation of 'Effective Date' Language.
>
> Federal Water Pollution Control Act Amendments of 1972 — Section 312(f)(3) — Interpretation of "effective date" language — Any State having a statute which prohibits discharge of vessel sewage into navigable waters is subject, at any time after January 30, 1975, to preemption of that statute by vessel meeting description outlines in Section 312(f)(2) — Where this occurs, the

'effective date' of initial standards and regulations promulgated under Section 312 is the date of compliance by such vessels — State may then immediately seek greater protection of its waters by prohibiting discharge of vessel waste from all vessels (§ 312(f)(3)).

"The Administrator has asked me to thank you for your letter of September 3 and to reply to your views as to the 'effective date' language in section 312(f)(3) of the Federal Water Pollution Control Act Amndments of 1972 ("the Act"). Our interpretation of 'effective date' for the purposes of 312(f)(3) has its basis in sections 312(c)(1) and (f)(2) of the Act.

"Section 312(c)(1), specifies effective dates for the initial standards and regulations under section 312: two and five years after promulgation for new and existing vessels, respectively. At those times, state laws affecting new and existing vessels are preempted by the Federal standard. The initial standards and regulations under section 312 of the Act were promulgated on January 30, 1975 (see 40 *Fed. Reg.* 4622). As a result of this promulgation, section 312(f)(2) took immediate effect.

"Section 312(f)(2) provides that if a vessel, after promulgation of the initial standards and regulations and prior to their effective dates as specified in 312(c)(1), is equipped with a marine sanitation device which complies with the initial standards and regulations and operation of such device is in accordance with such promulgated standards and regulations, those standards and regulations shall, for the purposes of fulfilling the 'effective date' provisions of 312(c)(1), become

> effective with respect to that vessel on the date of such compliance. In other words, section 312(f)(2) creates a third category of 'effective dates' for certain specified vessels. This third category of 'effective dates' has the practical result of causing early preemption of State laws regulating vessel sewage.
>
> "Any State having a statute which prohibits the discharge of vessel sewage into or upon navigable waters is subject, at any time after January 30, 1975, to preemption of that statute by vessel meeting the description outlined in 312(f)(2). Where this occurs, the 'effective date' of the initial standards and regulations promulgated under section 312 is the date of compliance by such vessels, and the state may, pursuant to 312(f)(3), immediately seek greater protection for some or all of its waters by prohibiting the discharge of vessel waste from all vessels.

United States Environmental Protection Agency, General Counsel Opinion No. 75-6 (Sept. 25, 1975).

We hold that Michigan's actions in seeking to make its absolute prohibition upon discharge of any sewage were not premature. In this regard, we point to Michigan's enactment of the Michigan Watercraft Pollution Control Act of 1970 and its continuation of that statute in effect after January 30, 1975. We also point to two subsequent requests by Michigan to the Environmental Protection Agency seeking the right under the federal statute to prohibit discharge of any sewage treated or untreated by any vessel after January 30, 1975. Thus, Michigan complied with the federal statutory requirement in § 1322(f)(3).

In this disposition of the prematurity issue in this case, we rely in considerable measure upon the Environmental Proection Agency General Counsel's Opinion just quoted above. In *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51, the U.S. Supreme Court pointed out:

> " 'When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain [an agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946).
>
> "Moreover, an administrative 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *see, e.g., Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961).
>
> "The question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is 'sufficiently reasonable' to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975). Our examination of the language, the

> legislative history, and the overall purpose of the 1897 provision persuades us that the Department's initial construction of the statute was far from unreasonable; and we are unable to find anything in the events subsequent to that time that convinces us that the Department was required to abandon this interpretation."

The statutory interpretation we deal with here is embedded in a lengthy and highly technical statute and its provisions are far from easy to reconcile. Reliance upon early interpretation by the agency charged with carrying out the terms of the Act is peculiarly appropriate under such circumstances. *See generally, American Meat Institute* v. *EPA*, 526 F.2d 442, 450, n. 16 (7th Cir. 1975); *Dow Chemical* v. *EPA*, 605 F.2d 673, 681 (3rd Cir. 1979).

Furthermore, plaintiffs in this case suggest no reason or logic as to why Michigan's application for the right to enforce its statute should be effective only after all three groups of vessels to which the statute applies are subject to the regulations.

In this proceeding, we are not, of course, dealing with any question as to any prosecution of any vessel for violating the regulation. The record does not disclose that any such prosecutions have been attempted in advance of termination of this litigation. We hold only that Michigan's application to enforce its statute was not premature under the Act.

THE SUBSTANTIVE ISSUES

A. *The Admiralty Clause Issue*

Plaintiffs contend that Michigan is undertaking to stop all interstate and international shipping from discharging sewage in its waters in spite of federal law to the contrary. They rely upon the Admiralty Clause contained in Article III § 2 of the U.S. Constitution which reads: "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." Plaintiffs also rely upon case law establishing a uniformity rule in the admiralty jurisdiction. Thus in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-575 (1875), the U.S. Supreme Court said:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' "
>
> * * *
>
> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity

> and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Language to the same general effect may be found in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 217 (1917) and in *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 163-64 (1920).

Preliminarily, it may be useful to note that the uniformity principle relied upon in *Lottawanna, Jensen* and *Knickerbocker Ice* appears to have been weakened in subsequent history in such cases as *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 108, 124-125 (1924); *Just* v. *Chambers*, 312 U.S. 383 (1941); *Standard Dredging Co.*v. *Murphy*, 319 U.S. 306 (1943) and *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

While none of these cases overrule *Lottawanna, Jensen* and *Knickerbocker Ice*, they do clearly serve to point out that state authority in relation to promoting the health and welfare of its own citizens is by no means eliminated by the admiralty "uniformity" cases previously cited. In the most arguably applicable of the modern cases to our present set of facts, the Supreme Court in a unanimous opinion in the *Askew* case, upheld the validity of a Florida statute subjecting shipowners to clean-up costs occasioned by oil spill damage to the Florida coastline. In doing so, the court relied upon Mr. Justice Stewart's opinion in *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960), upon which case Michigan relies heavily in this instant case. In *Askew* a unanimous court, after discussing the Admiralty Extension Act said as follows:

"*Huron Cement Co.* v. *Detroit*, 362 U.S. 440, however, arose after that Act became effective. Ships cruising navigable waters and inspected and licensed under federal acts were charged with violating Detroit's Smoke Abatement Code. The company and its agents were, indeed, criminally charged with violating that Code. The Court in sustaining the state prosecution said:

> 'The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities concurrently with the federal government' *Id.*, at 442.

"The Court reasoned that there was room for local control since federal inspection was 'limited to affording protection from the perils of maritime navigation,' while the Detroit ordinance was aimed at 'the elimination of air pollution to protect the health and enhance the cleanliness of the local community.' *Id.* at 445. The Court, in reviewing prior decisions, noted that a federally licensed vessel was not exempt (1) 'from local pilotage laws'; (2) 'local quarantine laws'; (3) 'local safety inspections'; or (4) 'local regulation of wharves and docks.' *Id.* at 447.

> "It follows, *a fortiori*, that sea-to-shore pollution — historically within the reach of the police power of the States — is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy.
>
> "As discussed above, we cannot say with certainty at this stage that the Florida Act conflicts with any federal act."

Id. at 342-44.

We have discussed the cases cited above presenting potential conflict between admiralty law under the federal jurisdiction and state law concerns primarily because the parties have emphasized them. It is, however, inappropriate for us to continue long without relating our current problem to its own discrete facts. If we had a direct conflict in this case between federal and state law, the Supremacy Clause would, of course, present a definitive answer. Under the specific facts of our instant case, however, there is no such conflict between the Michigan Watercraft Pollution Control Act of 1970 and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (1976). As is obvious from the sections of the Federal Act which we have set out previously in discussing the prematurity issue, Michigan has acted under the terms of the federal statute by applying for an exception under § 1322(f)(3) to the preemption clause contained in § 1322(f)(1). This exception, as previously quoted, provides as follows:

> "(3) *After the effective date of the initial standards and regulations promulgated under this section*, if any State determines that the protection and

> enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application."

As we have also previously pointed out, the Federal Environmental Protection Agency Administrator has made the required determination that "adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply."

Three other points need to be made. The first is that Michigan's action is wholly consistent with the stated purposes of the Federal Act which purposes are:

> "(a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—
>
> "(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

"(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

"(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

"(5) it is the national policy that area-wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

"(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

"(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under section 402 and 404 of this Act. It is further the policy of the Congress to support and aid

> research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connnection with the prevention, reduction, and elimination of pollution.
>
> "(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws."

The Federal Water Pollution Control Act, 33 U.S.C. § 1251.

Second, the structure of the federal enactment retained the power in a federal agency to determine whether the state was prepared "with adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels" and the Administrator has so certified.

Thus, Michigan's prohibition upon the discharge of all sewage treated or untreated into its waters is not only not prohibited by the federal statutory enactments, it is specifically provided for and has been specifically sanctioned by the federal agency charged with responsibility therefor.

Third, inspection of the legislative history of this Act shows that the Governor of Michigan, Governor William Milliken, was quoted very effectively on the floor of the House of Representatives in support of preserving the right for a state to adopt restrictions more stringent than those adopted by the federal government itself and that after vigorous debate, an amendment obviously designed to serve that purpose was offered by a Michigan Congressman, Congressman William D. Ford, and was adopted by a vote of 210 ayes to 173 noes with 49 not voting. The Congressional Record as it applies to the debate on the critical amendment is as follows:

> Amendment offered by Mr. William D. Ford:
>
> On page 338, amend lines 4 through 25 to read as follows:
>
> "(f) After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such state require greater environmental protection, such State may completely prohibit the discharge from a vessel of any sewage, whether treated or not, into such waters."
>
> The Chairman: The Chair will ask the gentleman from Michigan whether the amendment just offered by the gentlemen has been printed in the Record?
>
> Mr. William D. Ford: Yes, Mr. Chairman, it has, at page 10045 on March 23.
>
> The Chairman: The gentleman from Michigan is recognized for 5 minutes in support of his amendment.

Mr. William D. Ford: Mr. Chairman and members of the committee, this is a simple amendment designed to preserve the rights of individual States to prohibit discharge of sewage from vessels. I might attempt to explain it on the basis of a lengthy argument in defense of States' rights. Some of my distinguished colleagues might find it surprising that my cosponsor, the distinguished gentleman from Minnesota (Mr. Fraser) and I would be making an argument on the basis of States' rights, but I think the States' rights approach would be appropriate at this point.

I could also make, I believe, a strong argument on the basis of the overall wisdom of this approach to pollution control. But I would like to make a more direct approach, and that is, to ask you to consider the Detroit River, which is a major connection between the Great Lakes, and realize that now with the St. Lawrence Seaway open we carry more tonnage of shipping through that river in its short season than the annual tonnage which passes through the Panama and Suez Canals combined.

Then I would like you to think about what happens to our drinking water in Michigan each time somebody flushes a toilet on one of those ships. If you do this, I am sure you will understand the kind of appeal that I am making to you here today and I think you will want to support this amendment.

It is not necessary to talk about States' rights in order for you to understand, and you do not need, as has been suggested, a Geiger counter to tell you

what kind of pollution contamination is going into the water supplies of some 4 million people in the immediate area of my congressional district.

Twenty of the States, particularly around the Great Lakes, and along the Mississippi River, have now adopted and have in effect stringent regulations with regard to equipping all boats that carry toilet equipment with them, so that they will retain on board their sewage and waste and take it to the shore, and have it pumped out. If we do not adopt this amendment these existing statutes will, in effect, be wiped out.

Mr. Chairman, I know my time is running out, but I would like to close by reading a telegram from Governor William Milliken, of Michigan, which shows very clearly what the dilemma is for these States:

> Concerning H.R. 11896 which is now before you, we have not been able to obtain assurances from the EPA that Michigan's position concerning marine pollution would be protected under the new Federal Water Pollution Act. Therefore: I support amending the bill as reported to preserve the right for a State under a State law to adopt restrictions which are more stringent than those adopted by the Federal Government. This is important to the maintenance of Michigan's "no-discharge" boat pollution law.

The other Governors are joining with Governor Milliken of Michigan in asking us not to bar their right to enforce such legislation in the future, or enact legislation which can bar programs already underway, and not, by virtue of the provisions of this act, suspend these State laws for any length of time.

As I read the act, unless we adopt this amendment, laws like Michigan, Minnesota, and Wisconsin laws could become automatically suspended until such time as the EPA decided to write regulations to replace it and that could be up to 5 years. There are 45,000 boats registered in the State of Michigan now and we expect 75,000 by the end of the next 5 years — boats that are big enough to be equipped with toilets or, as some of my Navy friends say — have "heads" on them.

Mr. Chairman, by adopting this amendment we will simply be permitting Michigan and other States which determine the necessity, to enforce as they see fit, the control of vessel discharges within their own lakes and rivers.

Mr. Fraser: Mr. Chairman, will the gentleman yield?

Mr. William D. Ford: I yield to the gentleman.

Mr. Fraser: Mr. Chairman, I want to join the gentleman in urging support for this amendment, permitting States to completely prohibit the discharge from a vessel of any sewage, whether treated or not.

The bill before us marks a new and much needed approach to water pollution abatement. It sets admirable goals, provides generous funds, and employs some genuinely innovative and effective administrative procedures, such as the practices of "contract authority" and "user charges." Why then, does it take a backward step with regard to State regulation of marine sanitation devices?

We are still waiting for the final issuance of the Federal regulations required under existing law — Federal Water Quality Act of 1970, section 13f. When issued, these regulations will become effective 5 years after promulgation for existing vessels, and 2 years after promulgation for new vessels. States have had to act. They could not wait 5 years from some indefinite date in the future to stop waterborne polluters from dumping sewage.

Some have traditionally opposed State sanitary codes, health regulations, factory inspections, and such, on the grounds that it interfered with interstate commerce. Federal courts have, just as traditionally, upheld the right of States to protect the health and safety of their citizens.

The most recent Federal District Court decision, *New York State Waterways Ass'n* v. *Diamond*, F. Supp. (W.D. N.Y. Jan. 12, 1972) has found that "there is no merit to the claim of the plaintiff that the statute — New York's law banning sewage-discharge from boats — constitutes an unconstitutional burden on interstate commerce."

The argument is raised that a no-discharge requirement is impractical inasmuch as pumpout facilities do not exist. Pumpout facilities have sprung up wherever and whenever there was a need for them. Michigan, which had 75 pumpout facilities a year ago, has 175 today. On the St. Croix River, within 12 miles of a spot where I have a summer place, there are six pumpout stations, with charges ranging from $3 to $4.50. In addition, "midstreamer services" on the Mississippi are beginning to add pumpout facilities to their other

services. They can service vessels on the move. Pumpout facilities are economically viable. When a boatowner stops to have his holding tank pumped out he probably gets fuel and possibly provisions as well.

As to the cry of "chaos," the amendment I am proposing will not permit 50 gradations of standards. It will permit only two — a no-discharge policy for those States that need it, and whatever standards the EPA sets for others.

Without the threat of Federal preemption, I am convinced that many other States will follow the example of the 20 or so which already prohibit dumping sewage from boats.

The States I refer to are the States of Arizona, California, Colorado, Illinois, Indiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Texas, Utah, Vermont and Wisconsin.

We need this amendment to preserve the right of the States to require holding tanks, otherwise those State laws are going to be wiped out and boats are going to be dumping into the waters that we swim in.

In a way, the struggle over this small issue is a microcosm of the larger struggle to clean up our environment. We all realize the gravity of the water pollution problem. It may already be too late in the case of Lake Erie. But the temptation is still to put off the personal commitment that is necessary if we are to succeed in averting the doom being predicted so graphically by such authorities as Dr. Commoner and the Club of Rome.

Our amendment will cost the Federal Government nothing. But it will require some effort and expense on the part of individual boatowners. It is easier, after all, to eject wastes into the water. The facts are that the actual costs for boatowners to avoid polluting the waters upon which they navigate are within reason. For larger commercial vessels the Ford Motor Co. has set an example. It took only 4 weeks to install a $20,000 retention system in each of its six Great Lakes vessels in order to comply with Michigan law.

If we back down on this one — take this step backward in the struggle to clean up our waters, we will have done a double harm. We will have undone the good work of those States which have had the courage and initiative to pioneer in this field, and we will have indicated to an administration already subject to much pressure that the Congress is willing to go along with weaker regulations.

I urge you to support the marine sanitary devices amendment.

Mr. Jones of Alabama: Mr. Chairman, I will not belabor the point of the gentleman's amendment, but I would like to point out that we here in 1970 did exactly what the gentleman from Michigan, the author of this amendment, asked us to do. That was to preempt the States' rights in these circumstances in order that we could have some uniform approach to this problem.

So it seems to me we are coming back here today and saying: "Well, in 1970 you were not correct in your judgment of voting for the Water Quality Act and you want to come back and preempt the Federal Government and give it back to the States."

So it seems to me, that is a total inconsistency with what we are dealing with here in this proposition.

The committee recognizes that after the Federal preemption goes into effect, there could be such situations where the need for prohibiting discharges in certain bodies of waters outweighs the need for uniformity among the States.

Where those circumstances occur, subsection F3 of section 312 permits the Administrator, at the request of a State, to require a complete prohibition of discharge from a vessel of any sewage whether treated or not into any portions of the waters within the State.

Mr. Chairman, I regret to oppose the gentleman's amendment, but in all good conscience I do not see how we can march in here one day and take a position and come back and renege on it the next day.

Mr. Wright: Mr. Chairman, will the gentleman yield?

Mr. Jones of Alabama: I yield to the gentleman.

Mr. Wright: Mr. Chairman, I can sympathize with what the gentleman from Michigan seeks to achieve. Surely a State should not be prevented from improving upon the quality of its navigable waters. It is clearly the intention of the committee that the standards to be promulgated by the Administrator for marine sanitation devices shall be strong and forceful standards, coming as near as technology will permit to zero discharge. It also is the intention that the Administrator shall give full

and due consideration to the application of any State, as set forth in the committee bill, to require no discharge within its own waters wherever available on-shore treatment and disposal warrant it.

Mr. Pike: Mr. Chairman, will the gentleman yield?

Mr. Jones of Alabama: I yield to the gentleman.

Mr. Pike: Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, everyone is for pure water, but I expect those who use it most care most about it.

No one needs, appreciates, or is more willing to make sacrifices to achieve clean water than the boatmen who use it and love it.

But enough of generalities — here are some specifics. There were 428,114 boats registered in New York last year. All of them combined contribute less sewage to the waters of our State in 2 years than the city of New York does in 1 day. The Army Engineers tell me that approximately 450 million gallons of raw sewage is dumped into New York Harbor by New York City every single day. But boats shall have holding tanks.

In my own county there were 58,993 boats last year — and all of them combined contributed less sewage to the waters of my county than just one State institution the State University at Stormy Brook. The State, nevertheless, says boats must have holding tanks.

Because they are an easy target — a cheap shot — the State has singled out the boatowners. Not the

huge ocean liners or cargo ships. New York would not think of enforcing its holding tank law against them — just the private boatowners and fishermen and clamdiggers. Sewage is neither better nor worse when it comes out of a boat instead of a house or an apartment or a school. It should be treated exactly the same way. When we are ready to stop sewage or put stringent controls on — fine, hallelujah! But let us not create the illusion of a solution by whipping a scapegoat.

Finally, of course, there has to be uniformity. We who live on Long Island like to sail across Long Island Sound to Connecticut and across Block Island Sound to Rhode Island. But these States have a different law, so when I comply with the law in New York I cannot take my boat on a vacation across the sound for they have no facilities for pumping out the holding tanks. I have a boat — and I also have a car. I use my boat in interstate trips in the same manner I use my car or a train on interstate trips. For each State to use its own judgment, not on effluent, but on boat effluent alone, not on sewage treatment equipment, but on boat equipment alone, makes no more sense than to have 50 different gages of railroad tracks or 50 different requirements for automobile carburetors. This amendment should be defeated.

Mr. Terry: Mr. Chairman, will the gentleman yield?

Mr. Jones of Alabama: I yield to the gentleman.

Mr. Terry: Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, the present law, which we enacted in 1970, and the regulations promulgated thereunder are so strict that at the present time the only item that would be approved would be a holding tank.

The intent of Congress was set forth when we passed the Federal preemption which was established in 1970. We would be totally repealing that if we would adopt the amendment that is before us.

Those provisions were passed by the Congress because we recognized that vessels in interstate commerce and also many pleasure boats were faced with changing laws from one State to another.

I remember my own State of New York where we first passed the holding tank provision and then did not have holding tanks on certain lakes in order to accommodate the effluent.

We cannot afford to go back to the point of having situations where it cannot be a pleasurable experience to pass from one State to another.

Mr. Chairman, this amendment should be defeated.

We recognize that this amendment is unnecessary. We see nothing that the gentleman has proposed that will not be contained in the new law. The administrator has the right, and as the gentleman from Alabama stated, he can exercise that right where they find a situation that is not covered within the present exemption.

Mr. Jones of Alabama: Mr. Chairman, I should like to make one observation in relation to the

attitude of Governors. There has not been a single Governor of any State who has not advocated passage of this bill.

Mr. William D. Ford: I agree.

Mr. Jones of Alabama: So I do not think that any petition on behalf of any Governor to change any portion of our bill should cause us to do so. If the National League of Cities, the Governors and county government agencies come in asking us to pass this bill without amendment, why should we now hear about Governors requesting a change in one portion of this bill?

The Chairman: The question is on the amendment offered by the gentleman from Michigan.

The question was taken: and the Chairman announced that the noes appeared to have it.

TELLER VOTE WITH CLERKS

Mr. Fraser: Mr. Chairman, I demand tellers.

Tellers were ordered.

Mr. Fraser: Mr. Chairman, I demand tellers with clerks.

Tellers with clerks were ordered; and the Chairman appointed as tellers Messrs. William D. Ford, Grover, Wright, and Fraser.

The Committee divided, and the tellers reported that there were — ayes 210, noes 173, not voting 49, as follows: * * *

It is obvious that this debate, initiated by the Great Lakes States and more particularly by Michigan through its Governor and one of its Congressmen, won the right for states to ban all sewage treated or untreated if they first sought for and received the approval of the federal agency charged with administering the Act. The amendment proposed by Congressman Ford became in haec verba the first half of § 1322(f)(3). The second half of this same § 1322(f)(3) provided the exception requiring that the administrator first determine that there were adequate pumpout facilities available along the waters concerned.

In short, we believe that Michigan and other states properly employed their influence in the Congress of the United States to gain the right under federal law to prohibit any ship from dumping any sewage treated or untreated into Michigan waters.

By thus responding to the constitutional arguments advanced by plaintiffs based on the Admiralty Clause and federal cases suggesting the need for uniformity in admiralty law, we do not mean to ignore the practical arguments which plaintiffs bring to us. These will be considered under plaintiffs' second constitutional argument, namely, that the Michigan statute offends the equal protection provision of the Fourteenth Amendment. For the moment, we think it is sufficient to respond to the plaintiffs' arguments based upon the Admiralty Clause by what has been said thus far and by adding that the Federal Water Pollution Control Act does provide a uniform scheme looking by progressive stages toward completing elimination of pollution of the nation's waters.

B. *The Equal Protection Argument*

Plaintiffs' equal protection argument is set forth effectively in the concluding paragraph of Lake Carriers' brief:

> "The Michigan Watercraft Pollution Control Act of 1970 seeks to prohibit completely, and in its entirety, the overboard discharge of wastes from plaintiffs' vessels while at the same time no Michigan law prohibits municipalities or shore-based industry from discharging into the Great Lakes. The State obtains no benefit since the shore cities of Michigan do not yet have secondary waste treatment to an extent sufficient to receive wastes from all commercial vessels. There is no evidence that the discharge of waste from a vessel, given secondary treatment, is any more harmful than similar discharges from municipalities or industry. The Michigan Watercraft Pollution Control Act of 1970 does not rest upon any reasonable basis, is essentially arbitrary, and denies to plaintiffs the equal protection of the laws."

Plaintiff Lake Carriers Association Brief, at 25.

In what follows, defendant explicates its position concerning equal protection:

> "The provisions of 1970 PA 167 do not violate those standards. First of all, the State points out that there is an essential factual distinction between a shore-based point of discharge of wastes and a shipboard discharge of wastes into the Great Lakes. Michigan has the longest shoreline of any State except Alaska. The shore cities of Michigan not only discharge treated wastes into the waters of the Great

Lakes, but these communities also take their drinking water from the Great Lakes. Great care is taken in the location of the water intakes to insure that no waste material is discharged in such a way as to endanger the people who drink this water. The State constantly checks the quality of the water near any water intake. (A.119).[1] Therefore, if a shore-based discharge facility were to begin to pose any sort of problem in terms of a water intake (or a public bathing beach), the State could take immediate steps to alleviate the problem.

"Vessels, however, do not discharge at a given specific point. As is indicated by the appellants' route maps these boats are not sailing out in the middle of the lakes, but they are, rather, hugging the shoreline. Hence, the discharge of sewage from a boat could be anywhere along the shoreline. Such a discharge could, in fact, be *right over a municipal water intake*. While the State can protect its citizens from the shore-based discharge by keeping a vigilant watch on how close such discharges are to intakes, there is no conceivable way in which the State can protect its citizens from a helter-skelter discharge of potentially dangerous wastes along the shoreline by the hundreds of boats which regularly sail along the shoreline. By requiring the boats to discharge into shore-based facilities, the State can control the impact, if any, on shore-based water intakes and bathing beaches. Therefore, in terms of public safety, there is significant and substantial difference between the two types of discharges. (A. 120, 121). Such a factual difference is recognized as a legitimate basis for a difference in treatment.

"[1]A. Refers to U.S. Supreme Court Appendix." Defendant's Brief, at 41-42.

Early on, the U.S. Supreme Court set forth these rules for testing whether or not a state statute violates the equal protection clause:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U.S. 36, 41; *Louisville & Nashville R.R. Co.* v. *Melton*, 218 U.S. 36; *Ozan Lumber Co.* v. *Union County Bank*, 207 U.S. 251, 256; *Munn* v. *Illinois*, 94 U.S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U.S. 592, 615."

Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1910). *See also New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).

It is not, of course, surprising that Michigan — surrounded by the Great Lakes and host state to the shipping fleets of her sister states plus those of Canada and the world — should be particularly concerned about

ship pollution. It seems likely that no state has greater reason to take advantage of the federal statutory exception in order to seek to purify its waters. Further we cannot deem it "essentially arbitrary" for Michigan to distinguish between the hazards to its drinking water intake points[5] posed by countless mobile ship polluters and fixed and identifiable shore-based pollution sources. By their nature, the latter are much more easily watched over and guarded against than are the former.

Additionally, in seeking a major public good, like clean water, a state has a right to proceed, by stages, to its objective.

We hold that the Michigan Watercraft Pollution Control Act of 1970 does not offend the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

By what we have said above concerning the constitutional and legal issues we are required to decide, we do not intend to denigrate the importance of the debate concerning the costs in ship delay at pumpout locations or alternatively, the costs of installing larger holding tanks or equipment for burning all sewage residue and then placing the ash on shore. We have no doubt that these are practical problems of great magnitude. They also, however, concern legislative decisions within the jurisdiction of the U.S. Congress and the Michigan legislature and their decisions to this point have been detailed above.

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[5] One of the plaintiffs' exhibits shows that Michigan had as of 1960, 50 cities dependent upon water intakes from the Great Lakes as compared to the second state in order, Ohio which has 24.

THE FOREIGN TREATY ISSUE

In many respects what we have said already applies equally to the arguments advanced by plaintiff Dominion Marine Association. In its complaint, Dominion (representing 175 vessels of Canadian registry) contends concerning the Michigan Watercraft Pollution Control Act of 1970:

> "Shortly after passage of the Act many members of DMA received letters from defendants and/or their predecessors charged with enforcing and/or prosecuting violations of the Act, advising them of its principal provisions and requesting information as to plans for compliance. DMA, therefore, believes enforcement of the Act will be sought by defendants against its members and Canadian registered vessels, and defendants have admitted such intention in answer to DMA's claim in the Michigan state court proceeding.
>
> "By a decision filed December 27, 1979, the Supreme Court of Michigan determined that the Act absolutely prohibits the discharge of treated (or untreated) vessel wastes into Michigan waters, rejecting summarily interpretations placed upon the Act by the Circuit Court for the County of Mackinac and the Michigan Court of Appeals which would have permitted vessels to treat wastes in accordance with federal standards prescribed by the United States and Canada both as to devices used and the purity of the effluent produced.
>
> "DMA charges that the Act as so interpreted conflicts with the provisions and the expressed and intended national policies of both the United States and Canada under the Boundary Waters Treaty of

> 1909, 36 Stat. 2448, Treaty Series No. 548 and, more specifically, the United States and Canadian Great Lakes Water Quality Agreement of April 15, 1972, *United States Treaties and Other International Agreements* Vol. 23 Part 1, 1972, p. 301 et seq., and is therefore beyond the authority of the State of Michigan and invalid and unenforceable."

Complaint of Plaintiff Dominion Marine Association, at 3.

In its argument, Dominion relies upon the Boundary Waters Treaty of 1909, United States-Great Britain 36 Stat. 2448 et seq., T.S. No. 548 and in particular the following language therein:

> "— the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

36 Stat. 2448 at 2449.

Dominion also cites the following language from the Great Lakes Water Quality Agreement of 1972, 23 U.S.T. 301, T.I.A.S. No. 7312:

> "— in accordance with principles at least as stringent as the following:
>
> (a) Garbage shall not be discharged by a vessel into these waters

(b) Waste water shall not be discharged by a vessel into these waters in amounts or in concentrations that will be deleterious;

(c) Every vessel operating in these waters with an installed toilet facility shall be equipped with a device or devices to contain the vessel's sewage, or to incinerate it, *or to treat it to an adequate degree*. Emphasis supplied."

23 U.S.T. 301 at 334 (Annex 4).

We are unable to find in this record any prohibition upon free navigation for Canadian ships. As is clear from what has been said earlier, whatever expense or inconvenience Michigan's requirement of "no sewage discharge" may cause to Canadian shipping will likewise apply "without discrimination" to the "ships, vessels and boats of both countries." As to the language quoted from the Great Lakes Water Quality Agreement of 1972, Michigan statute is certainly "at least as stringent" as the standards set forth immediately above.

We have reviewed the language of these international treaties and find no provision contained therein which is violated by the Michigan Watercraft Pollution Control Act of 1970 or the Federal Water Pollution Control Act and the 1972 amendments thereto; nor indeed do we find any essential conflict between said treaties and said Acts.

Finally, and we believe quite conclusively, the Great Lakes Water Quality Treaty itself specifically provides:

"3. The specific water quality objectives adopted pursuant to this Article represent the minimum desired levels of water quality in the boundary waters of the Great Lakes System and are not intended to preclude the establishment of more stringent requirements."

Great Lakes Water Quality Treaty, *supra*, at 304.

We find no conflict between the treaties upon which Dominion Marine relies and the two statutes at issue in this case.[6]

For all of the reasons set forth above, judgment may be entered in this case dismissing plaintiffs' complaints and holding:

1) Michigan's actions seeking to implement 1970 Public Act 167 are not subject to dismissal as premature,

2) the congressional delegation of authority to the states contained in the Federal Water Pollution Control Act of 1970 as amended in 1972 represents a uniform policy decision by the U.S. Congress which does not offend the Admiralty clause or the equal protection clause of the U.S. Constitution, and

3) the State and Federal Acts in question do not contravene the treaty-making powers of Congress.

IT IS SO ORDERED. /s/ GEORGE C. EDWARDS, JR.
Chief U.S. Circuit Judge
/s/ DAMON J. KEITH
U.S. Circuit Judge
/s/ PHILIP PRATT
U.S. District Judge

Dated: December 15, 1981
Detroit, Michigan

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[6] In the Reply Brief of Plaintiffs, filed June 24, 1980, is included a *Memorandum of Understanding Concerning Marine Sanitation Devices Pursuant to the Great Lakes Water Quality Agreement*, dated May 6, 1980, and executed by representatives of the United States and Canadian Coast Guards. That Memorandum provides in part:

> "(1) Canadian commercial vessels meeting the provisions of the Canadian marine sanitation device (MSD) regulatory requirements will be permitted to operate in U.S. waters of the Great Lakes;"

This appears to be an understanding arrived at between the two services for enforcement purposes. Since there is no indication of approval by Congress, it can have no effect on the treaty issue in this case.

JUDGMENT

(United States District Court
Eastern District of Michigan Southern Division)

(Lake Carriers' Association, et al, Plaintiffs, v. Frank J. Kelley, Michigan Attorney General, et al, Defendants. Civil Action No. 36194)

In accordance with the Memorandum Opinion and Order filed contemporaneously herewith,

IT IS ORDERED that the complaint of plaintiffs and the complaint of intervening plaintiff be and the same are hereby dismissed.

/s/ GEORGE C. EDWARDS, JR.
Chief U.S. Circuit Judge

/s/ DAMON J. KEITH
U.S. Circuit Judge

/s/ PHILIP PRATT
U.S. District Judge

Dated: December 15, 1981
Detroit, Michigan

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(United States District Court
Eastern District of Michigan, Southern Division)

(Filed Feb. 2, 1982)

(Lake Carriers' Association, et al, Plaintiffs, and Dominion Marine Association, Intervening Plaintiff, vs. Frank J. Kelley, Michigan Attorney General, et al., Defendants. Civil Action No. 36194.)

Notice is hereby given that Lake Carriers' Association, et al., Plaintiffs, and Dominion Marine Association, Intervening Plaintiff, hereby appeal to the Supreme Court of the United States from the Judgment dismissing the complaint of the plaintiffs and the complaint of intervening plaintiff entered in this action on December 15, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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and

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Attorney for Dominion Marine Association, Intervening Plaintiff

Dated at Detroit, Michigan
February 2, 1982

DECISION OF THE COURT

(State of Michigan — Circuit Court — County of Mackinac)

(Received Feb. 22, 1978)

(Lake Carriers Association, et al, Plaintiffs, v. Ralph A. McMullan, et al, Defendants. File No. 614)

INTRODUCTION

This controversy arises out of an action brought pursuant to Rule 521 for a declaratory judgment seeking to resolve an actual controversy within the jurisdiction of this Court. Venue is grounded on 1961 PA 236, Ch 16 § 1615, CL 600.1615; MSA 27A.1615.

On March 16, 1971, Plaintiffs initiated an action for a declaratory judgment before a three-judge Federal District Court in Detroit, Michigan, pursuant to Section 2201 of Title 28 of the United States Code, to test the constitutional validity of the Michigan Watercraft Pollution Control Act of 1970 (Act 167, Public Acts of 1970, State of Michigan; CL 323.331; MSA 13.533; 201, et seq., (hereafter "the Act" or "the Michigan Act"). Various constitutional grounds of invalidity were asserted, namely that the Act unduly burdened interstate and foreign commerce; contravened uniform maritime law; violated due process and equal protection requirements; was constitutionally vague; and was invalid under the Supremacy Clause.

The District Court held that lack of a justiciable controversy precluded entry into the matter. The District Court also found compelling reasons dictated abstainance from consideration of the case in its then present posture. 336 F Supp 248.

An appeal was taken to the United States Supreme Court where it was held that the action did present an actual controversy within the meaning of the Declaratory Judgment Act, 28 USC § 2201, but abstention was proper because the Michigan Act was unclear in significant particulars and the Act has not been construed by the Michigan courts. In this circumstance, found the Supreme Court, abstention was appropriate because authoritative resolution by the State courts was likely to avoid or modify federal constitutional questions. The Supreme Court vacated the judgment below and remanded the case to the Federal District Court with direction to retain jurisdiction pending institution of appropriate preceedings in the Michigan Court. 406 US 498.

Pursuant to the decision of the Supreme Court of the United States, Plaintiffs brought this action to obtain a definitive determination of the questions of local law raised by the Supreme Court. In addition, Plaintiffs advised this court, they would also expose their Federal claims in the State court. Plaintiffs gave notice they intended, should this Court hold against them on the questions of State law, to return to the three-judge Federal District Court for disposition of their Federal contentions. *England* v *Medical Examiners*, 375 US 411; *Government Employees* v *Windsor*, 353 US 364.

The record before this Court consists of a stipulation of the parties which places before this Court consideration of the proceedings in the Federal District Court and the Supreme Court of the United States. This Court's record also includes depositions submitted and pleadings and decisions in this cause. This Court has had the benefit of oral argument and the filing of extensive briefs setting forth the respective positions of the interested parties.

CLAIMS OF THE PARTIES

It is Plaintiffs' position that the Michigan Act lends itself to an interpretation permitting the discharge of treated sewage from vessels which discharge conforms to federal standards and which, therefore, does not render the states' waters unsightly, noxious or otherwise unwholesome. Implicit in their contention is the position that the Michigan Act is unclear and ambiguous in significant particulars and must be construed according to established rules of statutory construction and in the light of pertinent State and Federal laws and treaties.

Plaintiffs further contend that the Michigan Act, if it is given the meaning advocated by Defendants, comes in conflict with Federal laws and treaties and violates United States constitutional provisions which would render the Michigan Act invalid and unenforceable.

Defendants claim the Michigan Act is unambiguous, making it manifestly clear that it is unlawful for Plaintiffs to discharge sewage, whether treated or untreated, from any cargo-carrying vessel engaged in commerce on the waters of the State of Michigaan, and that such vessels shall be equipped with a holding tank or self-contained marine toilet which will retain all sewage produced on such vessels for subsequent disposal at approved dockside or onshore collection and treatment facilities.

Defendants further contend that the aforesaid requirements of the Michigan Act are not in conflict with Federal law and United States treaties and do not violate the constraints of the Constitution of the United States.

FINDINGS OF FACT

(1) Plaintiffs are the Lake Carriers' Association and certain of its individual member companies who own and/or operate federally enrolled and licensed Great Lakes bulk cargo vessels. Intervenor Plaintiff, Dominion Marine Association, is an organization incorporated under the laws of the Dominion of Canada whose members own and/or operate Canadian registered commercial vessels in the Great Lakes.

(2) Defendants are the State Attorney General, The Department of Natural Resources and its Director, and the Water Resources Commission and its Executive Secretary.

(3) The Court adopts the following finding of fact of the Federal District Court, 336 F Supp 248:

> "Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the Great Lakes, the connecting waterways and tributaries and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.
>
> "As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,165 gross tons.

Flow charts indicate that the total commerce on the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters, come within three miles of land except when entering or leaving a port or when in a connecting waterway.

"A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the vessel is devoted to cargo. Crew sizes range from 30 to 35 men per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water)."

(4) As of January 1, 1977, the combined United States and Canadian Great Lakes fleet totaled 325 vessels, a considerable reduction from 1970 (Trimble Deposition, page 7; Ex. 2).

(5) Since the commencement of the federal litigation in 1971 there have been several significant developments affecting this litigation:

(a) On April 15, 1972, the Governments of the United States and Canada implemented the Boundaries Waters Treaty of 1909 between United States and Canada (36 Stat. 2448, Treaty Series No. 548) by adopting the Great Lakes Water Quality Agreement with Annexes and Texts and Terms of References. (Treaties and Other International Acts, Series No. 7312).

(b) The United States Environmental Protection Agency and the United States Coast Guard on April 21, 1976, adopted rules and regulations governing marine sanitation devices pursuant to the Federal Water Pollution Control Act as amended (33 U.S.C. § 1322; 33 CFR, Part 159).

(c) Similar implementing action was taken by Canada by adoption of compatible regulations governing marine sanitation devices. (Order-In-Counsel P.C. 1977-229, February 3, 1977)

(d) Since promulgation of the above cited regulations governing marine sanitation devices, a number of on-site sanitary treatment units have been certified pursuant to law as meeting the requirements of the regulations (Thursby Deposition, Ex. 2; 42 FR 6731). As a result, a number of such units have been installed on Great Lakes vessels. All of these certified marine sanitation devices meet Federal waste treatment standards for vessels, (Tri[illegible]e Deposition, page 12; Ex. 3).

CONCLUSION OF LAW

Before reaching the constitutional issues, this Court concludes that it must determine whether the Michigan Watercraft Pollution Control Act (MCLA 323.331 et seq.; MSA § 3.533 (201) et seq.) by its terms, requires the application of standards other than those established by the Federal Water Pollution Control Act, as amended (33 USC § 1251 et seq.), the rules and Regulations promulgated thereunder (41 FR 15324), the Boundary Waters Treaty of 1909 (36 Stat. 2448, Treaty Series No. 548) and the Great Lakes Water Quality Agreement of 1972 between the United States and Canada (Treaties and other International Acts Series 7312). If the Michigan Act is compatible there will be no constitutional issues to resolve.

We look then to the Michigan Act and pertinent federal legislation, rules and regulations adopted pursuant thereto and applicable treaties to determine if harmony can be established.

The Michigan statute, effective January 1, 1971, provides in pertinent part:

> "Sec. 3. (1) A person (defined in § 2(i) to mean 'an individual partnership, firm, corporation, association or other entity') shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any . . . sewage (defined in § 2(d) to mean "all human body wastes, treated or untreated") . . . or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

"(2) It is unlawful to discharge, dump, throw or deposit . . . sewage . . . from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

"Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the State Water Resources Commission of the Department of Natural Resources to operate on the waters of this state.

"(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft (defined in § 2(g) to include 'foreign and domestic vessels engaged in commerce upon the waters of this state' as well as 'privately owned recreational watercraft') having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with one of the following pollution control devices:

"(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

"(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

"Sec. 8. Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys . . . (of) the watercraft which utilize the docks or wharfs.

"Sec. 10. The Commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

"Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

In evaluating the Michigan Act, this Court is mindful of the directive received from the United States Supreme Court which said, page 511, 512 ibid:

"The Michigan Watercraft Pollution Control Act of 1970 has not been construed in any Michigan Court, and, as appellants themselves suggest in attacking it for vagueness, its terms are far from clear in particulars that go to the foundation of their grievance. It is indeed only an assertion by appellees that the Michigan law proscribes the discharge of even treated sewage in state waters. Section 3(2) of the Act does state that "it is unlawful to discharge . . . sewage . . . from a recreational, domestic or foreign watercraft used for pleasure or for (commerce) . . .," and § 4(1) does require vessels equipped with toilet facilities to

have sewage storage devices.[14] Yet § 3(1) seemingly contemplates the discharge of treated sewage by merely prohibiting any person from emitting sewage 'which (renders) the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.' Moreover, § 11 provides that 'to be enforceable, the provision (of the Act) or the rule (presumably promulgated thereunder) shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.' Michigan has thus demonstrated concern that its pollution control requirements be sufficiently flexible to accord with federal law."

THE FEDERAL WATER POLLUTION CONTROL ACT, as Amended

The Court must take cognizance of the recent enactment on December 27, 1977 of the Clean Water Act of 1977, P.L. 95-217; 91 Stat 1566 (33 USC 1251, et seq.). This new Act amends the Federal Water Pollution Control Act to update federal pollution standards for Great Lakes vessels. Specifically, Section 59 of the new Act requires the administrator of the Environmental Protection Agency to establish waste treatment standards for Great Lakes vessels that are, at a minimum, the

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[14] We assume that these provisions apply to commercial watercraft though even this is not textually clear. Section 3(2) in terms applies only to 'recreational' vessels, while § 4(2) — despite the expansive definition of 'watercraft' in § 2(g) — could be similarly limited in light of § 4(1), which governs only 'pleasure recreational watercraft.'

equivalent of secondary treatment standards for municipalities. The new standards and regulations take effect after such time as the administrator determines to be reasonable for the upgrading of marine sanitation devices. Thus, federal law now places vessels and municipalities on a parity with respect to waste treatment and accomplishes the objectives which the Michigan legislature sought to achieve.

THE BOUNDARY WATERS TREATY OF 1909 and the GREAT LAKES WATER QUALITY AGREEMENT OF 1972

Under international law treaties and executive agreements constitute equally binding obligations on the nation. *United States* v *Belmont*, 301 US 324; *Missouri* v *Holland*, 242 US 416. Furthermore, the external powers of the United States are to be exercised without regard to state law or policies. *United States* v *Pink*, 315 US 203.

In Belmont, pages 330-331, the Court said:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning . . . And while this rule in respect to treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."

The Boundary Waters Treaty, in addition to declaring in Article I the waters of the Great Lakes, including Lake Michigan, to be international waters for purposes of navigation, states in Article IV:

> "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

The Treaty further provides in Article XIII:

> "In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

The Great Lakes Water Quality Agreement implements the foregoing provision of the Boundary Waters Treaty. ANNEX 4 of the agreement provides that:

> "Every vessel operating in these waters with an installed toilet facility shall be equipped with a device or devices to contain the vessel's sewage, or to incinerate it, *or to treat it to an adequate degree.*" (Emphasis supplied).

In turn the rules and regulations dealing with marine sanitation devices promulgated under the Federal Water Pollution control Act implement both the Boundary Waters Treaty and the Great Lakes Water Quality Agreement.

In view of the fact that we are here dealing with an international problem, which is already extensively governed by federal law, the Court is persuaded that the Michigan statute should, if possible, be construed so as not to conflict therewith.

ANALYSIS AND RECONCILIATION OF STATUTE AND TREATY

Defendants claim that the Michigan Act is clear and unambiguous in that it proscribes the discharge of sewage, whether treated or untreated, from any cargo carrying vessel engaged in commerce upon the waters of the state.

Both the Federal District Court and the United States Supreme Court emphasized, as a principal reason for abstention, the desirability of a state court determination of the ambiguities in the Michigan Act. To these considerations must be added another — interpretation in light of other pertinent Michigan statutes. This Court finds the Michigan Act is not clear and unambiguous. It is necessary to construe the Michigan Act to ascertain if it does proscribe the discharge of all sewage as claimed by Defendants.

In construing a statute, the Court will look to the object to be accomplished, the evils and mischief sought to be remedied and place on it a reasonable construction which will best effect its purpose rather than defeat it. 82 CJS, Statute Sec. 323, *Stover* v *Retirement Board*, 78 Mich App 409, 412 (1977); *Municipal Investors Ass'n* v *City of Birmingham*, 298 Mich 314, 322 (1941); 299 NW 90; affirmed 62 S C CT. 975, 316 US 163, 86 L Ed 1341.

Generally, vague and ambiguous statutes must be interpreted as a whole and so construed that all of their

provisions have some meaning, the entire statute given effect, and a harmonious and consistent result produced. M.L.P. Statutes Sec. 95; *In re Petition of State Highway Commission*, 383 Mich 709 p. 714; 178 NW2d 923 (1970); *People* v *Miller*, 78 Mich App 336 (1977).

Further, in construing this particular statute, capable of more than one meaning, this Court believes it must look at statutes in *pari materia* to determine the evil sought to be remedied by the legislature. 82 CJS, Statutes, Sec. 365, 366; MLP Statutes Sec. 99; *Oakland Prosecutor* v *Parole Board*, 78 Mich App 111, 119 (1977); *Borden, Inc* v *Dept of Treasury*, 391 Mich 495, 523; 217 NW2d 667; *People* v *Martin*, 59 Mich App 471, 481 (1975).

Both the Federal Water Quality Improvement Act and the Michigan Act have a common objective — clean water. The Federal law contemplates, with certain exceptions, sewage control through onboard treatment before disposal in navigable waters. Section 3(1) of the Michigan Act is a general statement of environmental purpose expressing the overall statutory objective of prohibiting pollution of Michigan waters. Significantly, § 3(1) does not ban the discharge of all sewage, but seeks only to prohibit the deposit in Michigan waters of any sewage or liquid or solid materials which render the waters unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the waters for recreational purposes.

It is well known that municipalities and shore based industries discharge waste into the waters of the Great Lakes under permits issued by the State providing such waste receives secondary treatment in accordance with federal st ndards. See § 5 of the Michigan Water Resources Commission Act; Act 245, Public Acts of 1929, as amended, MCLA 323.5; MSA § 3.525.

This Court concludes that the Michigan legislature considers secondary treatment, in accordance with federal standards, as adequate sewage disposal and that such discharges do not render the waters unsightly, noxious or unwholesome. Were it otherwise, Michigan would prohibit entirely any disposal or wastes from any source whatsoever in the waters of the Great Lakes, whether treated or untreated. In other words, the thrust of the Michigan statutes, including the Act in question, is that discharges which impair water use are prohibited, but that those which do not are permitted. While § 2(d) of the Act defines "sewage" as "all human body wastes, treated or untreated", in order to reconcile this section with § 3(1), which only prohibits emission of sewage which renders the water "unsightly, noxious or otherwise unwholesome so as to be detrimental (etc)," the term "treated" in § 2(d) cannot be deemed to include wastes receiving treatment to a degree whereby the waters of the state are not so impaired. By such construction these provisions of the Act are reconciled with each other and § 3(1) of the Act, in turn, is harmonized with § 5 of the Michigan Water Resources Commission Act, supra.

The Act should not be read to proscribe the discharge of adequately treated sewage into Michigan waters. The discharge of treated sewage meeting federal standards is permitted by municipalities and industries, and to read the Act to proscribe such discharge from vessels raises serious constitutional questions avoided by an interpretation of the Act permitting the discharge of treated sewage from vessels which conforms to federal standards and which, therefore, does not render the state's waters unsightly, noxious or otherwise unwholesome . . ." The objective of the Act is thus

achieved and constitutional questions avoided, which could render the Act unenforceable, 82 C.J.S., Statutes, Sec. 316 (p. 545); *Insurance Commissioner* v *American Life Insurance Company*, 290 Mich 39, 44-45; 287 NW 368 (1939).

It is concluded by this Court that the Michigan legislature intended the Michigan Act to have a "flexibility" (Sec. 11), and to be construed in harmony and compliance with "federal, marine and navigation laws and regulations," and that under Section 3(1) the overboard discharge of wastes, treated to an adequate degree by a Federally (United States or Canada) certified marine sanitation device, is clearly permissible under the Michigan statute.

RELIEF GRANTED

Judgment shall be presented by Plaintiffs permanently enjoining the Defendants from enforcing the provisions of the Michigan Watercraft Pollution Control Act of 1970 so as to require containment or incineration of vessel wastes treated to acceptable federal standards by federally approved flow through marine sanitation devices, and which accordingly do not render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

Such judgment shall specifically affirm the continuing jurisdiction of this Court to modify or amend its judgment herein upon its own motion, or upon the motion of any party, in the event of change of circumstance of fact or law requiring such modification or amendment.

/s/ MARTIN B. BREIGHNER
Circuit Judge

Dated: Feb. 17, 1978

Motion to Dismiss or Affirm

FILED
MAY 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1814

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

LAKE CARRIERS' ASSOCIATION, et al,
and
DOMINION MARINE ASSOCIATION,

Appellants,

v

FRANK J. KELLEY, MICHIGAN ATTORNEY GENERAL, et al,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Southern Division

MOTION TO DISMISS OR AFFIRM

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1982

QUESTIONS PRESENTED

1. Where a Michigan statute prohibits discharge of sewage from vessels in Michigan waters in order to promote public health and welfare and to protect water quality and where enforcement of the statute has been specifically authorized pursuant to the provisions of the Federal Water Pollution Control Act, does the statute violate due process or equal protection, does it contravene maritime law or does it constitute an undue burden on interstate or foreign commerce?

2. Where a Michigan statute requires retention and onshore disposal of all sewage generated aboard vessels in Michigan waters in order to promote public health and welfare and to protect water quality, does the statute violate the Boundary Waters Treaty of 1909 (36 Stat 2448) or the Great Lakes Water Quality Agreement of April 15, 1972 (23 UST 301)?

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No. 81-1814

IN THE
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October Term, 1981

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Appellants,

v

FRANK J. KELLEY, MICHIGAN ATTORNEY GENERAL, et al,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Southern Division

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, affirm the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, on grounds that it is manifest that the questions on which decision of this appeal depends are so unsubstantial as not to require further argument.

COUNTERSTATEMENT OF THE CASE

A—Lake Carriers v Frank J. Kelley

On March 16, 1971, Appellants initiated an action for a declaratory judgment before a three-judge Federal District Court

in Detroit, Michigan, pursuant to Sections 1331, 1333, 1337, 2201, 2281 and 2284 of Title 28 of the United States Code, to test the constitutional validity of the Michigan Watercraft Pollution Control Act of 1970 [Act 167, Public Acts of 1970, State of Michigan; MCLA 323.331 *et seq*, MSA 13.533(201) *et seq*].

The Michigan Watercraft Pollution Control Act provides in pertinent part as follows:

> "Sec. 1(d) 'Sewage' means all human body wastes, treated or untreated.
>
> • • •
>
> "Sec. 1(g) 'Watercraft' means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.
>
> • • •
>
> "Sec. 3(1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.
>
> • • •
>
> "Sec. 4(2) A person owning, operating or otherwise concerned in the operation, navigation or management of

a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

"(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

"(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

• • •

"Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

After a full evidentiary hearing, the three-judge Federal District Court dismissed Appellants' complaint on the grounds that the lack of a judicable controversy precluded entry of the Court in the matter and that, in any event, the Court would abstain from further consideration of the matter. The opinion of the three-judge Federal District Court is reported at 336 F Supp 248 (1971).

Subsequently, Appellants appealed the decision of the three-judge Federal District Court to this Court which, on May 30, 1972, rendered a decision holding that Appellants' complaint

did present an actual controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, that was ripe for decision, but that the three-judge Federal District Court properly abstained from deciding the merits of the complaint pending authoritative construction by the Michigan courts of §§ 3(1), 3(2) and 4(2) of the Michigan statute. The opinions of the Supreme Court are reported at 406 US 498 (1972).

Pursuant to the above decision of this Court, Appellants brought an action for declaratory judgment in the Circuit Court for the County of Mackinac in order to obtain a definitive determination of the questions of local law raised by this Court. Appellants explicitly advised the lower court, however, that pursuant to *England* v *Medical Examiners*, 375 US 411 (1964), they were exposing their Federal claims there only for the purpose of complying with *Government Employees* v *Windsor*, 353 US 364 (1957), and that Appellants intended, should the Court hold against them on the questions of State law, to return to the three-judge Federal District Court for disposition of their Federal contentions.

Appellants, pursuant to *England* v *Medical Examiners*, *supra*, informed the Court of their Federal claims so that the Michigan Watercraft Pollution Control Act of 1970 might be construed in light of those claims.

B—Federal Grant of Authority to State of Michigan to Enforce No Discharge Rule

The State of Michigan did thereafter, through its Governor, apply for and receive certification from the Administrator of the United States Environmental Protection Agency under § 312(f) (3) of the Water Pollution Control Act, 33 USC 1322.

As set forth in Fed. Reg., Vol. 41, No. 10, p. 2274 (January 15, 1976), the Administrator of the EPA did on the 9th day of January 1976, certify:

"On October 9, 1975, notice was published that the State of Michigan had requested a determination by the Administrator, Environmental Protection Agency, pursuant to section 312(f) (3) of Pub. L. 92-500, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Michigan waters of Lakes Michigan, Huron, Superior, Erie and St. Clair, all waterways, connected thereto, and all inland lakes.

"The information submitted to me certifies that as of 1972 there were 49 public marinas, 104 commercial marinas available for use to the public, and 19 private marinas not available to the public, all of which have pump-out facilities to serve the recreational boating public. The State estimates that the number of recreational pump-out facilities now exceeds 200. It has been certified by the State that the treatment of wastes from each pump-out facility conforms to State and/or Federal requirements as defined in permit requirements. Moreover it has been certified by the State that although adequate pump-out stations are not available at all commercial ports, licensed septic tank haulers are reasonably available on call or through contract to pump out commercial vessels at any port in Michigan. For the 20 major ports that service commercial vessels, at least one such hauler is available for each of only three ports, and for each of the remaining ports there are up to eight such haulers available. In populated areas such haulers are available within a 15-mile radius from the port, whereas in upper Michigan's unpopulated areas such haulers are available within a 25-mile radius from the port. As part of the license, such haulers must deposit wastes into State-approved municipal treatment facilities.

"The information submitted to me certifies further that the quality or concentration of chemicals presently used as preservatives or odor suppressants for holding tanks will not prove a deterrent to the operation of the receiving municipal wastewater treatment plant. Such septic tank waste haulers are being and can be used successfully within the State of Michigan to pump out commercially the vessel or from a dockside holding vessel holding tanks either directly from tank to which sewage is pumped using the ship's pump.

"The Agency received approximately 169 comments in support of the Michigan petition. Approximately 26 comments were received opposing the petition; most of these commented on the general inadequacy of recreational pump-out facilities. Specifically, those opposing the petition variously complained of insufficient suction to pump out all types of recreational boats, inadequate operating hours, inconvenient locations, and excessive time requirements for pump out.

"Following an examination of the petition and supporting information, and in consideration of all comments received pursuant to the October 9 FEDERAL REGISTER notice, I have determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Michigan waters of Lakes Michigan, Huron, Superior, Erie and St. Clair, all waterways connected thereto, and all inland lakes. This determination is made pursuant to section 312(f) (3) of Pub. L. 92-500."

C—Dominion Marine Association — Intervenor v MacMullan

On 1 April 1976, the Dominion Marine Association filed its claim in the Circuit Court for the County of Mackinac praying that enforcement of the Michigan Watercraft Pollution Con-

trol Act of 1970 be enjoined; that the Act be declared invalid in its application to vessels engaged in commerce upon the waters of Michigan; or that, in the alternative, the Act be declared invalid in its application to Canadian registry vessels and its enforcement against Canadian vessels be enjoined; and that the Court grant such other and further relief as shall be just and proper.

The claim asserted:

A. That, in addition to the reasons of invalidity alleged by plaintiffs, Lake Carriers' Association, et al, the Act is invalid in that it conflicts with the United States - Canadian Boundary Waters Treaty of 1909, 26 Stat. 2448, Treaty Series No. 548 and the United States - Canadian Great Lakes Water Quality Agreement of April 15, 1972, *United States Treaties and Other International Agreements*, Vol. 23 Part 1, 1972, p. 301 *et seq.*

B. That Michigan, by its adoption of the Act and its intention to enforce it against Canadian-owned and registered vessels, has unlawfully entered into the domain of foreign affairs constitutionally reserved to the National Government in view of treaties on the subject covered by the Agreement existing between the United States and Canada.

The appellees denied the validity of these claims.

The case was submitted to the Circuit Court for decision on the basis of stipulated facts and a record consisting of pleadings and proceeding in the Federal District Court; United States Supreme Court; and further depositions and pleadings.

On February 17, 1978 the Court issued its opinion. On March 31, 1978 the Court executed its judgment and on April 4, 1978 the same was entered enjoining the Appellees from enforcing the Act.

On April 20, 1978 the Attorney General filed his claim of appeal from said judgment.

On June 25, 1979 the Court of Appeals, Second Division, rendered its opinion affirming the Lower Court. [91 Mich App 357, 282 NW2d 486 (1979)]

Thereafter the Attorney General sought leave to appeal to the Michigan Supreme Court.

D—**Michigan Supreme Court Decision**

The Michigan Supreme Court on 27 December 1979, entered its opinion reversing the judgments of the Mackinac County Circuit Court and the Court of Appeals. In its opinion the Court in lieu of granting leave reversed the judgments of the lower courts and held that:

> "[T]he WPCA prohibits the discharge of all sewage, whether treated or untreated, from the watercraft in Michigan waters." *Lake Carriers Association* v *Director,* 407 Mich 424, 425; 286 NW2d 416 (1979).

E—**Federal District Court**

Thereafter Appellants returned to the Federal District Court to litigate their Federal contentions.

Dominion Marine Association did thereafter on 7 February 1980 file their intervening complaint.

The three-judge panel of the United States District Court for the Eastern District of Michigan, Southern Division, on December 15, 1981, issued its opinion and order dismissing Appellants' complaints and holding:

"1) Michigan's actions seeking to implement 1970 Public Act 167 are not subject to dismissal as premature,

"2) the congressional delegation of authority to the states contained in the Federal Water Pollution Control Act of 1970 as amended in 1972 represents a uniform policy decision by the U.S. Congress which does not offend the Admiralty clause or the equal protection clause of the U. S. Constitution, and

"3) the State and Federal Acts in question do not contravene the treaty-making powers of Congress."

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

I

1970 PA 167, MCLA 323.331 ET SEQ, MSA 3.533(201) ET SEQ, IS A VALID EXERCISE OF THE STATE'S POLICE POWER TO PROTECT ITS NATURAL RESOURCES AND THE PUBLIC HEALTH, SAFETY, AND WELFARE OF ITS CITIZENS. IT DOES NOT UNCONSTITUTIONALLY IMPOSE AN UNDUE BURDEN IN INTERSTATE OR FOREIGN COMMERCE OR INTERFERE WITH FEDERAL ADMIRALTY OR MARITIME JURISDICTION, NOR OPERATE IN A FIELD PREEMPTED BY CONGRESS. NEITHER DOES THE ACT DENY PLAINTIFFS EQUAL PROTECTION OF LAW OR TAKE THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Each of Appellants' assertions are, we submit, without merit, supportable by neither the record nor case and statutory law. [The Appellants would now additionally assert to this

Court that the constitutionality of an Act of Congress has been drawn into question. We submit this issue was never properly raised below. Such purported issue was first raised by counsel for Appellants in briefs submitted prior to oral argument below and should therefore be dismissed. Furthermore the contention is without merit (See Opinion and order of the district court)]

A.

1970 PA 167, supra, does not conflict with the Federal Water Pollution Control Act and regulations promulgated thereunder. Rather than preempting the field, the Federal Government has by action of its officers sanctioned Michigan's enforcement of its laws completely prohibiting the discharge of any sewage, whether treated or not, into waters of the State of Michigan.

The Federal Water Pollution Control Act, 33 USC 1251 *et seq*, has as its stated object the elimination by the year 1985 of the discharge of all pollutants into navigable waters. Congress has, in its adoption of the Act, specifically recited and reiterated the traditional powers and responsibilities of the individual States to protect their waters from unlawful pollution. To quote from 33 USC 1251:

> "(a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—
>
> "(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on water be achieved by July 1, 1983;

"(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

• • •

"(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

• • •

"(b) it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

"(c) it is further the policy of Congress that the President, acting through the Secretary of State and such na-

> tional and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws."

1970 PA 167, *supra*, is, we submit, entirely compatible with such purposes and is in fulfillment of and consistent with the policy set forth in § 1251, *supra*.

Clearly there is no congressional intent to preempt the field. Had Congress sought to deprive the States of authority in this area, it would hardly have explicitly provided over and over again for State action.

Since this Court has repeatedly held that Federal preemption of the historic police power of the States will not be decreed "unless that was the clear and manifest purpose of Congress" *Rice* v *Santa Fe Elevator Corp.*, 331 US 218, 230 (1947)), it is clear that the Michigan statute must stand as a valid, constitutional exercise of the State's inherent police powers.

Absent congressional intent to create an exclusive system of regulation, the presumed validity of the Michigan statute should be upheld. *Swift & Co.* v *Wickham*, 230 F. Supp 398, 406 (S.D.N.Y. 1964), *cert den* 385 US 1036 (upholding State regulations or weights of fowl despite Federal Poultry Products Inspection Act). See also, *Terminal R. Assn. of St. Louis* v *Brotherhood of R. Trainmen*, 318 US 1, 7 (1942) (rejecting a claim that the Railway Labor Act preempted State laws regulating working conditions).

In the exercise of its police powers, Michigan may act in maritime and interstate commerce activities concurrently with the Federal government. In *Huron Portland Cement Co.* v *City of Detroit*, 362 US 440, 442 (1960) this Court upheld a local smoke abatement code of the City of Detroit that applied to ships' boiler stacks, even though the boilers were inspected and licensed by the Federal government:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the Federal Government."

We have progressed far beyond the area where the Federal government's jurisdiction of maritime and interstate commerce activities was used to strike down State health and sanitary regulations, and safety regulations for transportation and industry, *Ferguson* v *Skrupa*, 372 US 726, 729-732 (1963); *Huron Portland Cement Co.* v *City of Detroit, supra*, 362 US at 448.

As this Court said in *Huron Portland Cement Co.* v *City of Detroit, supra*, 362 US at 448:

> "The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme for community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

In *Kelly v Washington*, 302 US 1, 14 (1937), the Court upheld the right of a State to require a safety inspection of all tug-boats plying its navigable waters, and held:

> "When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the States to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess."

In *Terminal R. Assn. of St. Louis* v *Brotherhood of R. Trainmen, supra*, 318 US at 6-7, this Court held, with striking applicability to the case at bar:

> "State laws have long regulated a great variety of conditions in transportation and industry, safety devices and protections, purity of water supply, fire protection, and innumerable others. . . . [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation."

It is equally clear that only where a Federal and State statute inevitably collide, or where Congress has unmistakeably expressed its intent to occupy the field, that Federal preemption is deemed to exist; *Florida Lime & Avocado Growers* v *Paul*, 373 US 132, 142 (1963).

Congress has not preempted the subject arena; to the contrary it has authorized federal officials to sanction State enforcement, and that is precisely what has occurred here with respect to Michigan's "no discharge" requirements.

Consistent with provisions of 33 USC 1322 [PL 92-500 § 312(f) (3)] the State of Michigan received certification from the Administrator determining that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels was reasonably available on all waters of the State of Michigan. Fed. Reg. Vol. 41, No. 10, p. 2274 (January 15, 1976).

Thereafter, we submit, any questions concerning the compatibility of Michigan's no discharge requirement with the Federal Water Pollution Control Act of 1970, any questions concerning Federal preemption, undue burden on interstate commerce, or compatibility of the no discharge requirement with admiralty or maritime law were rendered moot. The Federal government has by its action sanctioned Michigan's enforcement of its laws *completely prohibiting the discharge of any sewage, whether treated or not, into waters of the State of Michigan.*

B.

Act 167, PA 1970 fully complies with the constitutional requirements of due process and equal protection and is not unreasonable, capricious or arbitrary.

Appellants allege the State statute constitutes a taking of Appellant's property without due process of law, in violation of the 14th Amendment of the Federal Constitution and, further, that the State statute denies Appellants the equal protection of the law, in violation of Section 1, 14th Amendment to the Federal Constitution.

Each of these arguments must fall, however, if there is any reasonable basis supporting the legislative enactment. This oft repeated principle was initially summarized by this Court in *Morey v Doud*, 354 US 457, 463 (1957):

> "[W]e start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson* v *Lee Optical Co*, 348 US 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley* v *Natural Carbonic Gas Co*, 220 US 61, 78-79."

In *Williams* v *Lee Optical Co.*, 348 US 483, 488, 489 (1955), this Court also stated:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they must be unwise, improvident or out of harmony with a particular school of thought."

• • •

"The prohibition of the equal protection clause goes no further than the invidious discrimination."

In the light of these persuasive Federal authorities it will admit of no doubt that Act 167, PA 1970, is not unreasonable, capricious or arbitrary for the reasons that the statute applies to all plaintiffs of the same class, with equal measure and in the same degree, and in no manner offends State or Federal due process or equal protection guarantees granted by the 14th Amendment to the Constitution of the United States.

It is plain that Act 167, PA 1970, regulates evenhandedly all watercraft on the navigable waters of this State to effectuate a legitimate public interest affording all equal protection without discrimination. The statutory impact is only incidental and does not constitute a direct burden on interstate commerce. Further, the State statute fully complies with the constitutional requirements of due process and equal protection under the 14th Amendment to the Federal Constitution.

The Appellant's contention that they are being denied the equal protection of the law by being held to higher requirements than municipalities proceeds from an inaccurate premise.

The provisions of 1970 PA 167 do not violate those standards set forth in *Lindsley* v *Natural Carbonic Gas Co., supra.* First of all, the State points out that there is an essential factual distinction between a shore-based point of discharge of wastes and a shipboard discharge of wastes into the Great Lakes. Michigan has the longest shoreline of any State except Alaska. The shore cities of Michigan not only discharge treated wastes into the waters of the Great Lakes, but these communities also take their drinking water from the Great Lakes. Great care is taken in the location of the water intakes to insure that no

waste material is discharged in such a way as to endanger the people who drink this water. The State constantly checks the quality of the water near any water intake. (A 119)[1] Therefore, if a shore-based discharge facility were to begin to pose any sort of problem in terms of a water intake (or a public bathing beach), the State could take immediate steps to alleviate the problem.

Vessels, however, do not discharge at a given specific point. As is indicated by the Appellant's route maps these boats are not sailing out in the middle of the lakes, but they are, rather, hugging the shoreline. Hence, the discharge of sewage from a boat could be anywhere along the shoreline. Such a discharge could, in fact, be *right over a municipal water intake.* While the State can protect its citizens from the shore-based discharge by keeping a vigilant watch on how close such discharges are to intakes, there is no conceivable way in which the State can protect its citizens from a helter-skelter discharge of potentially dangerous wastes along the shoreline by the hundreds of boats which regularly sail along the shoreline. By requiring the boats to discharge into shore-based facilities, the State can control the impact, if any, on shore-based water intakes and bathing beaches. Therefore, in terms of public safety, there is significant and substantial difference between the two types of discharges. (A 120, 121) (Deposition of William Turney, generally (March 29, 1977)). Such a factual difference is recognized as a legitimate basis for a difference in treatment. *Morey* v *Doud, supra.*

The second major inaccuracy in the Appellants' argument is their misinterpretation of the record concerning secondary waste treatment by shore municipalities. In point of fact, the State of Michigan is making, and has made, great progress in

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[1]

A refers to US Supreme Court Appendix submitted in *Lake Carriers* v *MacMullen* (No. 71-422, October Term, 1971)

converting such treatment plants into secondary treatment plants. As is set out in the testimony of Ralph Purdy, substantial progress had been made by these municipalities and it was then estimated that all of Michigan's shore municipalities would have operational secondary waste treatment facilities by 1973-1974. (A 132, 133, 134)

The minimum standard for Michigan communities is today secondary treatment. The progress of Michigan municipalities in eliminating the discharge of pollutants into the waters of the State of Michigan has and will continue with the ultimate objective being the complete elimination of the discharge of all pollutants into the waters of the State of Michigan. (Deposition of William Marks, pp. 3, 4 (April 18, 1980). Deposition of William Turney, pp. 6, 10, 11, 12 (March 29, 1977)).

Thus, contrary to the Appellant's assertions, this is an area in which two very different problems are essentially being treated the same way. There is, therefore, no equal protection problem presented on this record. *All watercraft traversing Michigan waters are subject to the same requirement regarding the discharge of sewage.*

C.

Admiralty or maritime law is not infringed upon by the Michigan statute.

Appellants lean heavily upon the proposition that the Michigan statute is completely invalid as an infringement upon the exclusive Federal domain of admiralty and maritime law. Too broadly do they interpret the decisions upon which they rely. In *The Lottawanna*, 88 US (21 Wall.) 558, 581 (1874), this Court found that the jurisdiction of the United States extends "to all cases of admiralty and maritime jurisdiction", but nonetheless said:

> "Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes, and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of State laws."

At that time in history the Court even left the purely maritime subject of pilotage, the guidance of a vessel, to State action until Congress acted. In the case at hand the subject matter, viz., discharge of sewage, cannot even remotely be connected with the operation of a vessel in the sense of an "admiralty" or "maritime" procedure.

In *Kelly* v *Washington,* 302 US 1 (1937), this Court upheld a state vessel inspection act in an area wherein Congress had not acted. The Michigan statute is not in derogation of any Federal licensing requirements which embrace inspection or certification by the Federal government of sewage treatment or containment devices. The Michigan statute does not provide for the regulation of design, construction, installation and operation of marine sanitary devices, but merely prohibits the overboard discharge of treated or untreated sewage to waters of this State, and provides that vessels equipped with marine toilets be equipped with holding tanks or incinerating devices. Indeed, Federal inspection and approval of the sanitary devices mandated under Michigan law; i.e., holding tanks, would take place. Lest it be interpreted elsewise, the Michigan statute under Section 11 thereof defers to Federal standards for design, construction, installation and operation of holding tanks.

II

1970 PA 167 DOES NOT CONFLICT WITH THE "BOUNDARY WATERS TREATY OF 1909", 36 STAT 2448 ET SEQ, OR THE "GREAT LAKES WATER QUALITY AGREEMENT OF 1972" 23 TIAS PART 1 P 301 ET SEQ; NEITHER DOES THE ACT INTRUDE INTO THE DOMAIN OF FOREIGN AFFAIRS.

Admittedly State law shall yield when it is inconsistent with, or impairs the policy or provisions of a treaty or of an international compact or agreement. See *US* v *Pink*, 315 US 203 (1942); *Nielson v Johnson*, 279 US 47 (1929). Such inconsistency cannot be demonstrated in the instant matter.

The 1972 Executive Agreement contemplates and encourages continued State and Provincial action to control and prohibit pollution of boundary waters; and, further, recognizes that a complete prohibition of discharges may be imposed on all or parts of the Great Lakes.

The adoption and enforcement by the State of Michigan is entirely consistent with the "Boundary Waters Treaty of 1909", *supra*, and the "Great Lakes Water Quality Agreement of 1972", *supra*.

Art IV of the Boundary Waters Treaty provides in relevant part:

> "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

That Treaty commitment compels the State of Michigan under its police power to eliminate the pollution of boundary waters. Michigan's statute is entirely compatible with the Treaty and obligation of this State to exercise its legislative power to compel compliance with the commitments of that Treaty.

Article I of the Treaty provides in part:

> "The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

The Michigan statute applies with equal force to all vessels be they domestic, interstate or foreign in registry. Neither does the Michigan Act proscribe or limit the continued free and open navigation of all navigable boundary waters. Free and open navigation does not preclude the exercise of the police power to prevent pollution of waters. *Huron Portland Cement Co.* v *City of Detroit, supra.*

Article I of the Great Lakes Water Quality Agreement provides in part:

> "As used in this Agreement:
>
> • • •
>
> "(c) *"Compatible regulations' means regulations no less restrictive than agreed principles;*

• • •

"(j) 'State and Provincial Governments' means the Governments of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, and the Government of the Province of Ontario;" (emphasis added)

Article II provides:

"The following general water quality objectives for the boundary waters of the Great Lakes System are adopted. These waters should be:

""(a) Free from substance that enter the waters as a result of human activity and that will settle to form putrescent or otherwise objectionable sludge deposits, or that will adversely affect aquatic life or waterfowl;

"(b) Free from floating debris, oil, scum and other floating materials entering the waters as a result of human activity in amounts sufficient to be unsightly or deleterious;

"(c) Free from materials entering the waters as a result of human activity producing colour, odour or other conditions in such a degree as to create a nuisance;

"(d) Free from substances entering the waters as a result of human activity in concentrations that are toxic or harmful to human, animal or aquatic life:

"(e) Free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae."

Article III provides in part:

"1. The specific water quality objectives for the boundary waters of the Great Lakes System set forth in Annex 1 are adopted.

"2. The specific water quality objectives may be modified and additional specific water quality objectives for the boundary waters of the Great Lakes System or for particular sections thereof may be adopted by the Parties in accordance with the provisions of Articles IX and XII of this agreement.

"3. *The specific water quality objectives adopted pursuant to this Article represent the minimum desired levels of water quality in the boundary waters of the Great Lakes System and are not intended to preclude the establishment of more stringent requirements.*

"4. Notwithstanding the adoption of specific water quality objectives, all reasonable and practicable measures shall be taken to maintain the levels of water quality existing at the date of entry into force of this Agreement in those areas of the boundary waters of the Great Lakes System where such levels exceed the specific water quality objectives." (emphasis added)

Article IV provides:

"Water quality standards and other regulatory requirements of the Parties shall be consistent with the achievement of the water quality objectives. The Parties shall use their best efforts to ensure that water quality standards and other regulatory requirements of the State and Provincial Governments shall similarly be consistent with the achievement of the water quality objectives."

Clearly, provisions of the Great Lakes Quality Agreement indicate it is not the intent of the signatories to preclude either State or Provincial governments from regulating water pollution. Adoption of a "no discharge" rule is consistent with the achievement of water quality objectives and such regulations are "compatible" as that term is defined therein. Likewise the application for and receipt of authority to enforce such no discharge rule is compatible with the quoted Articles. Had it been the intent of the signatories to preclude State and Provincial action it hardly would have provided in Article X, § 2 that:

> "2. The Parties commit themselves to seek:
>
> "(a) The appropriation of the funds required to implement this Agreement, including the funds needed to develop and implement the programs and other measures provided for in Article V, and the funds required by the International Joint Commission to carry out its responsibilities effectively;
>
> "(b) The enactment of any additional legislation that may be necessary in order to implement the programs and other measures provided for in Article V;
>
> "(c) The cooperation of the State and Provincial Governments in all matters relating to this Agreement."

The Federal government in granting to the State of Michigan authority to enforce a "no discharge" rule did not violate the provisions of the Agreement. Such grant is compatible with both Article I(e), Article II, Article III, Article X 2(c) and Annex 4, which provides:

> "1. Definitions. As used in this Annex:

"(a) 'Garbage' means solid galley waste, paper, rags, plastics, glass, metal, bottles, crockery, junk and similar refuse;

"(b) 'Sewage' means human or animal waste generated on board ship and includes wastes from water closets, urinals or hospital facilities handling fecal material;

"(c) 'Vessel' means any ship, barge or other floating craft, whether or not self-propelled;

"(d) 'Waste water' means water in combination with other substances, including ballast water and water used for washing cargo holds, but excluding water in combination with oil, hazardous polluting substances or sewage.

"2. Compatible Regulations. The Parties shall adopt within one year from the entry into force of the Agreement regulations governing the disposal of vessel waste in the waters of the Great Lakes System in accordance with principles at least as stringent as the following:

"(a) Garbage shall not be discharged by a vessel into these waters;

"(b) Waste water shall not be discharged by a vessel into these waters in amounts or in concentrations that will be deleterious;

"(c) Every vessel operating in these waters with an installed toilet facility shall be equipped with a device or devices to contain the vessel's sewage, or to incinerate it, or to treat it to an adequate degree.

"3. Critical Use Areas. Critical use areas of the Great Lakes System may be designated where the discharge of waste water or sewage shall be limited or prohibited.

"4. Containment Devices. Regulations may be established requiring a device or device to contain the sewage of pleasure craft or other classes of vessels operating in the Great Lakes System or designated areas thereof."

That grant of authority given by the United States to the State of Michigan implicitly confirms that in proscribing discharge of sewage from all vessels the State has not intruded into the area of foreign affairs.

III

CERTIFICATION BY THE ENVIRONMENTAL PROTECTION AGENCY GRANTING THE STATE OF MICHIGAN AUTHORITY TO ENFORCE ITS NO DISCHARGE RULE WAS NOT PREMATURE.

Appellants' contentions are without merit. The decision of the lower court is persuasive and requires no further agreement. Application for and certification by EPA was timely made.

CONCLUSION AND PRAYER

WHEREFORE, Appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to require further argument, and Appellees respectfully move the Court to dismiss the appeal herein, or in the alternative affirm the judgment of the United States District Court, Eastern District of Michigan, Southern Division.

Respectfully submitted,

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April 30, 1982